TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible], 1914

No. [illegible] 518

RAIL AND RIVER COAL COMPANY, APPELLANT,

vs.

WALLACE D. YAPLE, MATHEW S. HAMMOND, AND THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JUNE 4, 1914.

(24,255)

(24,255)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 1104.

RAIL AND RIVER COAL COMPANY, APPELLANT,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1914.

1 UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said District, on the First Tuesday in April, being the 7th day of said Month in the year of our Lord one thousand nine hundred and Fourteen, and of the Independence of the United States of America, the one hundred and thirty-eighth, to-wit: on Saturday, the 23rd day of May, A. D. 1914.

Present:

Hon. John W. Warrington, United States Circuit Judge.
Hon. John E. Sater, United States District Judge.
Hon. John M. Killits, United States District Judge.

In Equity. No. 233.

RAIL AND RIVER COAL COMPANY
vs.
WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio.

Said action was commenced on 16th day of April, A. D. 1914, and proceeded to disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

(*Bill of Complaint. Filed April* 16, 1914.)

In the United States District Court for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,
vs.
WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

Bill of Complaint.

To the Honorable the District Judges of the Northern District of Ohio, Eastern Division:

Rail and River Coal Company, a corporation, brings this, its bill of complaint, against Wall-ce D. Yaple, Mathew B. Hammond and

Thomas J. Duffy at East Liverpool, Ohio, in the Eastern Division Commission of Ohio, and thereupon said plaintiff complains and alleges:

I.

Said plaintiff is and has been for a long time past a corporation organized and existing under the laws of the State of West Virginia, and is a citizen of said State of West Virginia, and a resident thereof.

II.

That the said defendants, Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy are citizens and residents of the State of Ohio, defendant Wallace D. Yaple, residing at Chillicothe, Ohio, defendant Mathew B. Hammond at Columbus, Ohio, and defendant Thomas J. Duffy at East Liverpool, Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this court.

Said defendants are the duly appointed, qualified and act-
3 ing members of The Industrial Commission of Ohio, having been appointed as such members under and pursuant to an Act of the Legislature of the State of Ohio entitled "An Act Creating The Industrial Commission of Ohio," passed March 12, 1913, approved by the Governor of said State March 18, 1913, and duly filed in the office of the Secretary of State on March 20, 1913. Said defendant Wallace D. Yaple is Chairman and said Mathew B. Hammond is Vice-Chairman of said Commission. Said Act is set forth at length in the Session Laws of the State of Ohio for the year 1913, Volume 103, pages 95 to 110, both inclusive, to which Act, for the full text thereof, complainant begs leave to refer, as fully as though the same were at length incorporated herein.

That under and by the terms of Section 22 of said Act it is made the duty of said Industrial Commission, and it is given the power, jurisdiction and authority on and after the first day of September, 1913, to administer and enforce the general laws of the State of Ohio relating to mines, manufacturing and other establishments. Under the provisions of Sections 18, 19, 20, 21, 22 and 35 of said Act, said Commission is given extensive inquisitorial powers, and it is made the duty of all employers to furnish to said Commission information pertaining to their private business affairs, to enable it to carry into effect the provisions of said Act and the orders of said Commission made thereunder, and said employers are required to make specific answers under oath to all questions submitted to them by said Commission, and to give said Commission access to their establishments and places of business. Under the provisions of Section 36 of said Act said Commission is given authority to direct the prosecution of any action, proceeding, investigation, hearing or trial relating to matters within its jurisdiction, and upon the request of said Commission it is made the duty of the attorney gen-
4 eral of Ohio or the prosecuting attorneys of the various counties in said State to aid said Commission and prosecute under the supervision of said Commission all necessary actions or

proceedings for the enforcement of said Act, and for the punishment of all violations thereof.

III.

Said plaintiff is now and for many years last past has been actively engaged in the State of Ohio in the business of mining and selling coal, and now owns and for a long time past has owned in said State a large acreage of coal lands, consisting approximately of 32,000 acres, of the value of more than $1,000,000.00, upon which said lands said plaintiff has four coal mines properly developed, in which it employes upward of 2,000 persons, and from which said mines said plaintiff's average daily production is about 2,800 mine cars of two tons each of coal; that among said employés of plaintiff are about 1,700 persons who are paid on the basis of the ton for mining or loading coal.

IV.

Plaintiff further shows to the court that the business of coal mining in the State of Ohio is very large; that there are about six hundred (600) coal mines in said State, in which there are employed upwards of 45,000 persons; that upwards of 36,000 tons of coal were produced in the year 1913, and there was expended in wages to said employés in said year upwards of $23,000,000.00.

V.

Plaintiff further shows to the court that Western Pennsylvania, the States of Illinois and Indiana are likewise large producers of coal; that the mines located in these States are in close competition with each other and with the mines in the State of Ohio in the sale of the coal produced by their respective properties; that a great majority of the operatives engaged in the coal mining business in said States are members of an organization known as The United Mine Workers of America. That for many years last past it has been the custom for said mine operatives, through their representatives in said organization, under arrangements made with the various coal operators in the said States, to enter into contracts with said operators for the period of two years, whereby the interests of said operatives and their employers have been subserved by securing reasonably uniform wages for the different kinds of labor performed in said mines; that the last agreement entered into was for the period of two years, expiring on April 1, 1914.

That it has been for many years last past the custom and practice of large users of coal, such as railroads and large manufacturing concerns, to make contracts for their fuel requirements by the year, and that many of said contracts expired about April 1, 1914, or will expire in the immediate future, and practically all of them prior to May 20, 1914.

VI.

Plaintiff further shows to the court that the wage agreement referred to, which expired April 1, 1914, as well as several of said agreements theretofore made, covering the wages of such mine operatives as are paid by the ton in the said States of Pennsylvania, Ohio and Indiana, provided for the screening of coal and for payment of wages at a certain price per ton for lump coal, to-wit: such coal as would pass over a bar screen of certain dimensions, wherein the bars were 1¼ inches apart; of said four States, the mines in said State of Illinois, alone, operating upon any other basis, except that in the State of Indiana the operators, at their option, paid on a mine run basis also, and plaintiff states to the court that said method of screening coal and paying the miners and loaders thereof, upon the basis of such coal as will pass over said screen,
6 is designed and well calculated to induce carefulness in mining, in that said loaders and miners exercise greater care in the manner in which charges of powder are placed to break down said coal, and in the manner in which said coal is loaded after the same is broken down, and the safety of the operatives is much enhanced because of the better condition of the roof of the mines, growing out of the smaller charges of powder used therein.

That for the reasons aforesaid, those engaged in the mining business operate their mines more economically and in a safer manner, and coal of a better grade is produced when the mines and loaders are paid upon the lump coal basis.

VII.

Plaintiff further says that by Section 970 of the General Code of Ohio, the owners and operators of coal mined in said State are required to permit their mine operatives to employ, and it is the universal custom in said State for such operatives to employ, a representative known as check weighman, whose duty and right it is to examine the scales and screening apparatus and machinery at the mine, and see the coal weighed and check such weights, and make a correct record thereof. By this law the operatives are protected and secured against any false weight or improper screening of their coal, and from any improper deductions from the coal mined or loaded by them.

VIII.

Plaintiff further shows to the court that on the 20th day of May, A. D. 1914, there will become effective a certain Act of the General Assembly of Ohio, known as Senate Bill No. 3, entitled "An Act to Regulate the Weighing of Coal at the Mines," which was duly passed by the General Assembly of Ohio on or about February 5, 1914, approved by the Governor of the State of Ohio on
7 February 17, 1914, and filed in the office of the Secretary of State on February 20, 1914, a true copy of which is hereto attached, marked "Exhibit A" and made a part hereof.

IX.

That in and by the terms of said Act it is provided that every miner and every loader of coal in any mine in this State, who, under the terms of his employment, is to be paid for mining or loading such coal on the basis of the ton, or other weight, shall be paid for such mining or loading according to the total weight of all coal contained within his car in which the same shall be removed from out of the mine, unless the contents of such car when so removed shall contain a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by the said The Industrial Commission of Ohio.

X.

It is further provided in said Act that said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt or other impurities unavoidable in the proper mining or loading of the contents of the several cars of coal in the several operating mines in said State of Ohio, and said Commission is given power to change, after investigation, any percentage ascertained or determined by it from time to time as it shall deem necessary.

XI.

It is further provided in said Act that it shall be the duty of the miner or loader of coal, and his employer, to agree upon and fix for stipulated periods of time the percentage of fine coal allowable in the output of the mine wherein such miner or loader is employed,
and if such agreement is not made, the said Industrial Com-
8 mission is authorized to fix and determine the same. Said Commission is also empowered to change from time to time the percentage of fine coal which may be so lawfully loaded. Said Industrial Commission, if it finds that for a period of one month there shall be produced a greater percentage of fine coal than that fixed and determined by it, is authorized to make and enforce such orders relative thereto as will result in reducing the percentage of such fine coal to that fixed by said Commission.

XII.

It is further provided in said Act that it shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of the contents thereof over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid to such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished, and it is provided that any person, firm or corporation who shall violate such provision in respect thereto shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined for each separate offense not less than $300.00, nor more than $600.00.

XIII.

It is further provided in said Act that any miner or loader of the contents of the mine car who loads a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by said Industrial Commission shall be guilty of a misdemeanor, and upon conviction shall be punished for the first offense within a period of three days by a fine of fifty cents; for a second offense within such period by a fine of One Dollar; and for a third offense with- such period by a fine of not less than Two Dollars, nor more than Four Dollars.

9

XIV.

Plaintiff further shows to the court on information and belief that on or about the — day of February, 1914, and pursuant to said custom of entering into said biannual contracts, the various operators engaged in the mining of coal in the said States of Ohio, Pennsylvania, Indiana and Illinois, by their representatives, met and conferred with the duly authorized representatives of their employés in the City of Philadelphia, Pennsylvania, with the view to making a wage agreement covering the employment of said operatives in all said four States for the period of two years, beginning with April 1, 1914; that at said meeting said operatives demanded that in the State of Ohio, coal should be mined and produced, and the wages of miners and loaders be determined, in all respects in conformity with said Act of the General Assembly, and in no other manner; that said meeting was adjourned without agreement; that later, on or about the — day of March, 1914, a further meeting was convened in the City of Chicago, Illinois, at which the operatives repeated the same demand with respect to the methods of mining and paying for the coal mined in the State of Ohio, but offered to renew, unmodified so far as weighing and screening of coal was concerned, the contracts expiring on April 1, 1914, in respect to the business of coal mining in the States of Pennsylvania, Illinois and Indiana, but no offer or proposition was made to make any contract with respect to the mining of coal in Ohio, except upon the basis of the said Act of the Ohio Legislature aforesaid.

XV.

Plaintiff further shows to the Court on information and belief that the operators of coal mines in the State of Ohio (among which is the plaintiff herein), were ready and willing to renew, to take effect on April 1, 1914 for the period of two years, the contract
10 which expired on said date, and that the inability to reach such an agreement with their operatives was largely, if not wholly due to the existence of said Act aforesaid prescribing the methods of mining and determining the basis of wages of said miners and employés, and delegating to the said Industrial Commission the powers therein prescribed, and fixing and prescribing the penalties that would be incurred by said operators and said employés for any violations thereof.

XVI.

Plaintiff further shows to the court on information and belief that on April 1, 1914, the owners and operators of mines in the State of Ohio, being unable to secure men to operate their said mines upon the basis and terms upon which said mines had been operating for two years theretofore, were compelled to close down said mines, to their great detriment and damage, and that plaintiff was required for said reasons to close down its mines, to its great loss and damage.

XVII.

Plaintiff further charges that said Act, to-wit: said Senate Bill No. 3, is unconstitutional and void, and of no effect whatsoever, for, among other reasons, the following, to-wit:

(1) It violates the fourteenth amendment to the Federal Constitution, in that it abridges the privileges and immunities of the plaintiff, and deprives it and other persons similarly situated of the liberty of contract, and constitutes an unwarranted and arbitrary interference with plaintiff's right to manage its business of mining, producing and selling coal according to its own judgment, and takes the property of the plaintiff and others similarly situated without due process of law.

(2) Said Act confers authority and power on said Commission and requires it to determine for each operator and each miner and loader in the State, who is paid by the weight, the percentage of impurities unavoidable in proper mining or loading of coal in cars and the allowable percentage of slack or fine coal, thus depriving the said operator and his employés of the right to determine, bargain and contract for the quality of coal to be produced from said mine, all in violation of said Fourteenth Amendment.

11 (3) In conferring power on said Industrial Commission to prescribe the percentage of fine coal that may be loaded and the percentage of slate, sulphur and other impurities that may be loaded with the coal, and prescribing penalties for violations thereof by the miner or loader, said Act constitutes an unwarranted interference with the rights and liberties of said miner and loader, and with his freedom of contract with his employer; and likewise, in requiring the operator to accept and pay for coal of a quality fixed by said Commission, said Act interferes with the freedom of the employer to fix and determine the quality of the product of his mine and interferes with the freedom of the employer and the employé to contract with each other,—all in violation of said Fourteenth Amendment.

(4) The duties devolving on said Commission under said Act, if exercised pursuant to the powers conferred on said Commission by the Act creating said Commission, and especially by Sections 18, 19, 20 21 and 22 thereof, authorize and require said Commission to investigate and inquire into the private business affairs of the operator, all in violation of the rights secured to said operator by the Constitution of the United States, and especially the Fourteenth Amendment thereof.

(5) The plan provided by said Act of fixing the quality of said coal by said Commission, that may be lawfully mined and loaded, is wholly impracticable in the daily business operations of a mine and would result in material and arbitrary interference with the operations of the mine, in violation of said Fourteenth Amendment.

(6) Said Act is not within the police power, or any power of the State of Ohio. It is not designed nor intended to promote nor protect, nor does it bear any relation to the health, safety nor general welfare of the public. It is not intended nor designed to prevent fraud upon the operatives in coal mines. Said operatives by Section 970 of the General Code of Ohio are specially empowered to and in fact do by universal custom, supervise, check and determine the weighing and weight of all coal produced.

(7) The penalties and fines prescribed in Section 6 of said Act, to-wit: Senate Bill No. 3, are so extreme and cumulative as to deter and prevent any person, firm or corporation described in said Act, and subject to its provisions, from challenging the validity thereof, and such persons, firms or corporations are thereby constrained to submit to the provisions of said Act rather than take the chance of the penalties imposed. The minimum fines prescribed in said Section 6 of said Act would amount, in plaintiff's case, to over $800,000.00 per day for each day's operation of plaintiff's property.

Said Act, for the reasons herein mentioned, denies to this plaintiff and to other persons similarly situated, the equal protection of the law as secured and guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

XVIII.

Said Act is likewise unconstitutional and void in that it violates Section 1 of Article 1 of the Constitution of the State of Ohio, in prohibiting the freedom of contract therein guaranteed and secured.

12

XIX.

Said Act is further in violation of the Constitution of the State of Ohio in that it delegates legislative authority to said Industrial Commission, in violation of Section 1 and Section 26 of Article 2 of said Constitution.

XX.

Said Act is further in violation of Section 16, Article 2, of the Constitution of Ohio, which provides that no law shall embrace more than one subject, which shall be clearly expressed in its title, in that the title to said Act relates exclusively to the weighing of coal at the mine, while said Act purports, in the body thereof, to confer upon said Industrial Commission wide powers of inspection and supervision of the manner and methods of mining coal, and empowers said Commission to determine the quality of coal, which shall be paid for as such, and the contents of mine cars, which shall be binding upon employés and employers, regardless of their contracts in reference thereto.

XXI.

Plaintiff further shows to the court that because of said Act, said Senate Bill No. 3, and the uncertainty in respect to the constitutionality thereof, plaintiff's mines are closed down as aforesaid, and plaintiff is unable to make or accept contracts which are now being offered, and particularly contracts for periods of one year or more, which contracts are now being taken, as plaintiff is advised and believes, by the coal operators in said States of Pennsylvania and Indiana, competitors of the plaintiff, and plaintiff is now, and before the effective date of said Act, suffering great immediate and irreparable injury by reason thereof.

XXII.

Plaintiff further shows to the court that said defendants
13 acting as said Industrial Commission, as plaintiff is informed and believes, has taken steps and measures, or is about to take steps and measures, to put said Act in full force and effect, and to that end has employed its agents and a special representative, whose duties are to assist said Commission under said Act, and to make the investigations in respect to the matters and things provided for therein, and plaintiff is advised and believes that said Industrial Commission, through said representative or deputy, and its employés and other agents, is about to demand access to the mines and property of plaintiff, with a view of determining and investigating, and examining into the business of mining as heretofore conducted and carried on by said plaintiff, and plaintiff is advised that said Industrial Commission threatens to and will promptly on May 20, 1914, put into full effect all the provisions of said Act, in the meantime trespassing upon plaintiff's property and *and* the property of other operators of coal mines in Ohio, in the making of said preliminary investigations, as hereinbefore outlined; that said proposed investigations are for the purpose provided in said Act, and constitute an unwarranted and illegal inquiry into the private business affairs of plaintiff.

XXIII.

That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the enforcement of said Act, and from the requirements by said defendants acting as said Industrial Commission in the enforcement thereof, and to prevent a multiplicity of suits against the plaintiff, and to prevent prosecutions under said Act and the imposition of the heavy penalties described therein, and to prevent immediate and irreparable injury which will be caused to plaintiff by reason of the fact that it
14 is prevented from operating its mines and from accepting contracts for the sale of its coal, a writ of injunction is necessary to restrain said defendants from interfering with plaintiff and other persons similarly situated.

XXIV.

That the amount in controversy herein and the value of the matters disputed herein, and the loss which the plaintiff is sustaining by the threatened enforcement of said Act, and the damages to plaintiff, as hereinbefore set forth, will greatly exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

XXV.

Inasmuch, therefore, as plaintiff has no remedy in the premises, save in a court of equity, plaintiff prays the aid of the court.

1. To the end that the said Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, defendants herein, as members of and constituting The Industrial Commission of Ohio, may, without oath (answer on oath being expressly waived), full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged;

2. To the end that said Act, Senate Bill No. 3, may be decreed to be unconstitutional and void, and of no effect whatsoever;

3. To the end that plaintiff may be decreed to have the right to operate its mines and property, and to mine and sell its coal, without compliance in any way with the restrictions in said Act set forth, and with the regulations and orders of said Industrial Commission thereunder;

4. To the end that plaintiff, its agents and employees may be secured against unlawful and illegal trespassing and arrests, fines and penalties, by reason of any alleged violation of said Act;

That the said Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, their agents, deputies, representatives attorneys and employees of every kind whatsoever, may be perpetually and forever restrained by the order and injunction of this court from,

(*a*) Enforcing and attempting to enforce any of the provisions of said Act, said Senate Bill No. 3;

(*b*) From entering upon plaintiff's premises for the purpose of making, with respect to said Senate Bill No. 3, any investigation pretended to be authorized by said Act of the Legislature of Ohio creating said Industrial Commission;

(*c*) Making or establishing any rules or regulations in respect to the amount of fine coal or the amount of impurities to be loaded into cars at plaintiff's mines, or to be taken as a basis for, or considered in connection with, the wages to be paid to and received by said miners and loaders of coal;

(*d*) Beginning any action of any nature whatsoever against plaintiff, its agents or employees, on account of any violation of said Senate Bill No. 3;

(*e*) Arresting or causing the arrest of any agent or employee of plaintiff.

And that said defendants, each and all of them, may be in the meantime so restrained during the pendency of this suit, and plaintiff prays for such other relief as it may in equity be entitled to.

XXVI.

May it please your Honors to grant unto the plaintiff not only a writ of injunction conformable to the prayer of this bill to
16 be issued to the above named defendants, but also writ of subpœna to be issued out of and under the seal of this Honorable Court, to be directed to said defendants, Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, commanding them, at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court, then and there to answer the premises, but not under oath (answer under oath being expressly waived), and to abide by the order and decree of the court therein, and that said defendants may appear herein according to law.

RAIL AND RIVER COAL COMPANY,
Plaintiff,

By A. C. DUSTIN, *Its Solicitor.*
HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS, *Att'ys.*

A. C. DUSTIN,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, Cuyahoga County, ss:

W. R. Woodford, being first duly sworn, upon his oath deposes and says that he is the President of Rail & River Coal Company, plaintiff in the foregoing action, and duly authorized in the premises; that he has read the statements and allegations contained in said bill and knows the contents thereof and that the same are true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes them to be true.

W. R. WOODFORD.

Sworn to by the said W. R. Woodford, and subscribed by him in my presence this 16th day of April, 1914.

[SEAL.] ADRIAN WYCHGEL,
Notary Public.

17 **EXHIBIT "A."**

(Senate Bill No. 3.)

An Act to Regulate the Weighing of Coal at the Mines.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. Said industrial Commission shall, as to all coal mines in this state, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of
18 such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such

miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity.

C. L. SWAIN,
Speaker of the House of Representatives.
W. A. GREENLUND,
President of the Senate.

Concurred February 5, 1914.

Approved February 17, 1914.
JAMES M. COX, *Governor.*

I hereby certify that the foregoing is a true copy of the engrossed bill.

———— ————,
Secretary of State.

Filed in the office of the Secretary of State February 20, 1914.

19 (*Subpœna in Equity, Issued April* 16, 1914.)

THE UNITED STATES OF AMERICA.
Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on or before the twentieth day after service, excluding the day thereof, to answer a certain Bill in Equity, filed and exhibited in said Court, against them, by

Rail and River Coal Company, citizen of and resident in the Stat of West Virginia.

Hereof they are not to fail under the penalty of the law thenc ensuing. And have you then and there this writ.

Witness the Honorable John M. Killits, and the Honorabl William L. Day, District Judges of the United States, this 16t day of April, A. D. 1914, and in the 138th year of the independenc of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk*,
By R. C. DEAN, *Deputy Clerk*.

Memorandum.

The said defendants are required to file their answer or othe defense in the Clerk's Office on or before the Twentieth day aft service, excluding the day thereof, otherwise the bill may be take pro confesso.

B. C. MILLER, *Clerk*.
D.

20 (*Endorsement on Subpœna when Issued.*)

No. 233. United States District Court, Northern District of Ohi Rail and River Coal Co. vs. Wallace D. Yaple et al. Subpœna i Equity. Return day May 7, 1914. Hoyt, Dustin, Kelley, McKe han & Andrews, Complainant's Attorneys.

(*Endorsement on Subpœna when Returned.*)

April 21, 1914. I hereby accept service for all defendants.

ROBERT M. MORGAN, *Att'y*,
(*Special Counsel for Attorney General of Ohio*) *for all Defendants.*

Returned and Filed April 21, 1914. B. C. Miller, Clerk, U. District Court, N. D. O.

21 (*Opinion of Court, Filed May* 20, 1914.)

United States District Court, Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. DUFFY, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

On Application for an Interlocutory Injunction.

Decided May 20, 1914.

Before Warrington, Circuit Judge, and Sater and Killits, District Judges.

Per Curiam:

The plaintiff, a West Virginia corporation, a large producer of coal and employer of mine laborers, of whom there are more than 45,000 in Ohio, assails the constitutionality of the Ohio law of February 5, 1914, entitled "An Act to Regulate the Weighing of Coal at the Mines," and asks for an interlocutory injunction against the defendants, who constitute the Industrial Commission of Ohio, to prevent them from enforcing and attempting to enforce any of the provisions of such act. The act, in so far as it need be considered, is set forth in margin.* Diversity of citizenship and the

*SECTION 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such

22 presence of federal questions confer jurisdiction. Siler v. Louisville & Nashville R. R. Co., 213 U. S., 175, 191; Michigan Central R. R. Co. v. Vreeland, 227 U. S., 59, 63, 64; Louisville & Nashville R. R. Co. v. Siler, 186 Fed. Rep., 176, 179; Ohio River & W. Ry. Co. v. Bitty, 203 Fed. Rep., 537, 589; Mutual Film Co. v. Industrial Commission of Ohio, decided in this District April 2, 1914.

---

agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. * * *

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

The Ohio Coal Commission, appointed by virtue of a joint
23 resolution of the General Assembly (103 Ohio L., 981) "to investigate and report an equitable method of weighing coal at the mines, when the employees are to be paid for their labor on the basis of weight, measure or quantity, and that will at the same time be to the best interest of the consumers and protect the coal measures of the state," submitted a report in December, 1913, in which, following a review of the evidence and arguments of both operators and miners, it recommended for passage a bill which finally assumed the form of the present act. The information thus brought to the attention of the General Assembly, and to which counsel in the present hearing freely alluded, in so far as deemed material is summarized in the next succeeding paragraph and is as follows:

All mine employés are required to belong to the United Mine Workers—the strongest labor organization in the country. They have had no difficulty in the past in securing fair wages. The system of paying miners long in vogue in nearly all Ohio mines originated when only lump coal was marketable and is based on the amount of coal mined and passed over a 1¼ inch screen, which amount is assumed to be 28%. The insistence of the miners that they are paid for but a part of the product of their labor began when the finer grades of coal became salable. Their persistent grievance, although it will not bear analysis, engendered disputes and bitter feeling between them and their employers. A statute (Sec. 956, General Code of Ohio) whose purpose is the avoidance of danger, especially in gaseous mines, wisely requires the removal of fine coal and coal dust from the mines, for the violation of which (Sec. 976, *9.* C.) the offender may be punished by fine or imprisonment, or both; but the miners, believing their grievance to be just, have not always removed such coal and dust and thereby neither obviate such danger nor conserve the coal supply. Generally stated, from 20% to 50% of the coal under the heretofore prevailing systems of
24 mining has been left in pillars, ribs and stumps. The coal so left deteriorates from exposure, becomes somewhat crushed by the overlying strata, and yields a more than ordinary percentage of fine coal, in consequence of which the miners either wholly refuse to draw such supports or decline to do so unless paid a sum additional to the regular contract price. In many instances, on account of such unwillingness, those portions of mines which yield an unusual amount of fine coal have been abandoned and the fuel so indispensable to industrial progress is lost. On account of dissimilarities in the character of coal, the quantity of fine coal produced varies in different mines and even in different portions of the same mine—the variations in some instances being quite marked. The result is a variation in the wages of miners of equal skill and ability and an advantage to operators obtaining an excess of fine coal as against the miners and also as against other operators in districts in which an effort is made to secure as large a percentage of lump coal as is possible. The increased openings between screen bars, resulting from the wear incident to use, diminish the quantity of lump coal passing over such bars, to the loss of the miner. The failure to sub-

stitute new screens is due in part to the negligence of the check-weighman, authorized by statute (Sec. 970, G. C.) and selected and paid by the miners to call attention to the defective character of the screens, and in part to the carelessness of the operators in failing to maintain screens conforming to their contract. Each, however, charges the other with the responsibility of such failure and instances have occurred in which the miners have struck and closed down mines on account of disputes and delays regarding the furnishing of new screens. Neither the charge that the operators so dump mine cars as to break the coal (by an excessive drop from such cars to the screens, for instance), nor the counter charge that the miners will not permit such dumping as will eliminate the fine from the lump coal, is proved; but the cupidity and the carelessness
25 of each are deemed factors worthy of consideration. If coal be shot from the solid, payment on the mine run basis will result in an increased quantity of fine coal. Whether such increase will occur if the coal is undercut before it is shot down, as was done with about 95% of the coal mined at the time the report was filed is, in view of the experience in other states having kindred statutes and the difference in the Ohio coal from that of other fields, problematical. If an increase occurs, it will operate quite prejudicially to the sale of Ohio coal. The adoption of the mine run system will also cause, to the prejudice of the operators, a considerable increase in the amount of impurities brought to the surface, unless some way be found to protect the operator from the carelessness and indifference of the miner, and will require the inauguration of some method of cleaning. It will also necessitate some increased expenditure in the readjustment of tipples. The commission, in view of its findings so summarized as above, concluded that the present system of mining is inequitable, unjust, and productive of discontent. To obviate existing conditions, and to conserve the coal by supplying an incentive to employés to remove pillars, ribs and stumps and the portion of mines yielding more fine coal than is usual and to load and send from the mine the fine coal which is now left underground, the commission recommended that shooting from the solid be prohibited and that the mine run system of payment be adopted, but so safeguarded as to apply to clean coal only, i. e., coal so cleaned as to be marketable.

The plaintiff charges that the act, in lodging in the industrial commission the duty of determining the percentage of impurities unavoidable in the proper mining or loading of coal, and of fixing, in case of disagreement between the mine operator and his employés and until they subsequently agree, the percentage of fine coal allowable in the output of the mine, unreasonably, unnecessarily
26 and arbitrarily deprives the operator, whose business, it is alleged, is strictly private and unaffected by any public interest, from contracting with his employés for the production of coal containing more impurities or having a greater degree of purity than that which the commission has fixed, and denies him the right to reject and requires him to accept and to make payment for the total contents of each mine car, without deduction or diminution, so

long as the percentage of impurities fixed by the commission is not exceeded. It avers that the act is not designed to protect the morals, health, or safety of the public or of mine employés and has no real or substantial relation as between the purposes attributed to it and the means devised for attaining such purposes, but has for its object the regulation of the relations between masters and such of their servants as are paid by weight for coal mined or loaded; and that it is therefore unconstitutional in that it deprives the plaintiff of liberty and property without due process of law and of the equal protection of the law as guaranteed by the fourteenth amendment and the Ohio bill of rights.

The act must be sustained, unless it can be clearly shown to be in conflict with some constitutional provision. Board of Health v. Greenville, 86 Ohio St., 1, 20; Schmidinger v. Chicago, 226 U. S., 578, 587, 588; Mutual Film Co. v. Industrial Commission of Ohio, supra. It came into existence through a claimed exercise of the police power, a power which extends to the making of regulations "promotive of domestic order, morals, health and safety." Railroad Co. v. Husen, 95 U. S., 465, 471. Laws enacted in its appropriate exercise have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (Camfield v. U. S., 167 U. S., 518, 524), to promote harmonious relations between capital and labor (McLean v. U. S., 211 U. S., 539, 549, 550), to avert strikes, violence and bloodshed (Peel Splint Coal Co. v. West Virginia, 36 W. Va., 802; Knoxville Iron Co. v. Harbison, 183 U. S., 13, 21), to provide for the safety and health
27 of miners (Freund, Police Power, Sec. 115; Plymouth Coal Co. v. Pennsylvania, 232 U. S., 531), and to regulate mines and mining and to conserve and avoid the waste of fuel, minerals and other natural resources. (Barrett v. Indiana, 229 U. S., 26, 29; State v. Ohio Oil Co., 150 Ind. 21; Ohio Oil Co. v. Indiana, 177 U. S., 190; Hudson Water Co. v. McCarter, 209 U. S., 349; Wilmington Star Mining Co. v. Fulton, 205 U. S., 60).

The rule announced in McLean v. Arkansas, supra, which involved a statute akin to that here under consideration, has subsequently been so often approved by the Supreme Court as to be controlling in the present instance, if the Ohio act is not materially different from that of Arkansas and is free from the constitutional infirmities which resulted in the overthrow of the earliest statute for the weighing of coal before screening (93 Ohio L., 33) in Re Preston, 63 Ohio St., 428. It is contended that the McLean case is not an authority on account (among other things) of the powers conferred on the industrial commission, the alleged absence of a provision granting to operators the right, under proper circumstances, to reject coal brought to the surface, the possibly heavy penalties that may be imposed on offending operators, and the alleged obscurity and uncertainty of the penalties to which transgressing employees will be subjected and that the act must be held to be in excess of the state's police power and contrary to its declared policy in view of the Preston case, which pronounced invalid a law less vulnerable, it is claimed, to constitutional objection. None of the state

courts has passed upon the present statute. The courts may declare the public policy when the law-making power is silent, but when the people, acting within constitutional powers, have, by amendment to their fundamental law enumerated the subjects of legislative action, such constitutional provision and statutes enacted in harmony therewith must be enforced and not nullified by the courts.

28 Probasco v. Raine, 50 Ohio St., 378, 391. Subsequent to the decision of the Preston case, the state constitution was amended by adding to Article 2 the following sections:

"SECTION 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health and general welfare of all employés; and no other provision of the constitution shall impair or limit this power.

SECTION 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Without determining the soundness of the argument that the act indirectly at least establishes a minimum wage, in that it insures the miner full pay for all coal mined in accordance with the prescribed regulation, it may not be said that, in supplying an incentive for more effectually securing the removal of fine coal and coal dust to the surface and thereby minimizing or dissipating the danger arising from their continued presence in the mines, the act does not provide for the health, safety and general welfare of employés. Furthermore, section 36 was designed to limit by appropriate legislation the freedom of contract as regards the methods of mining, weighing and measuring coal. We are not prepared to hold that the legislature, acting within the scope of that section may not say that the business of mining coal is so far affected with a public interest as to justify appropriate regulation of the manner of paying employés when they are to be paid according to the quantity produced and when such regulatory statute will operate to allay discord and strife and conserve the coal supply.

The Ohio act does not restrict the right of contracting for the labor of miners by the day, week, month or year, or in any other manner (except as to quantity) that the operator may deem proper.

29 If the miner or loader by the terms of his employment is to be paid by the ton or other weight, the right of contract is then curtailed to the extent that he shall be paid according to the total weight of the coal contained in the mine car—such contents to include, however, no greater percentage of slate, sulphur, rock, dirt or other impurities than is unavoidable, as determined by the industrial commission. If the employé should send to the surface an excess of such impurities, or of any of them, the operator is not required to accept the car or pay for its contents as delivered but is at liberty to agree with him as to the deductions to be made on account of impurities. If no agreement is made, the offending employé may be prosecuted for his violation of the commissioners' order as for a misdemeanor. If he be unable or unwilling to pay the fine imposed, he may be imprisoned in the county jail until his fine and costs are paid or secured to be paid or he is otherwise legally

discharged, provided that he be given credit upon his fine and costs at the rate of sixty cents per day for each day's imprisonment. Sec. 13,717, G. C. He is thus subjected to penalties which are neither obscure nor uncertain. The act does not require the operator to mingle the contents of such a car with the other coal produced or prevent his removing, by screening or otherwise, the excess of any impurities. It must be presumed that the industrial commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the commissioners' order, which by statute is made prima facie reasonable and lawful, he may petition for and obtain a hearing before the commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the state. Act February 27, 1913, 103 Ohio L. 95, Sections 25, 27, 38-42; Art. 4, Sec. 2, Ohio Constitution. The commission may of its own motion upon investigation modify
30 or rescind any of its prior orders. The law permits the employer and employé to stipulate as between themselves what percentage of coal commonly known as nut, pea, dust and slack shall be allowable in the output of the employer's mine. It is only in case of their disagreement that the commission may designate such percentage, and its orders in that behalf must possess the same characteristics as those above mentioned and are likewise subject to rehearing and review. If at any time for a period of one month during the operation of the mine the percentage so fixed is exceeded, the commission is required to enforce its order regardless of whom the offender may be. The act prescribes no penalty for disobedience to such an order, but if, as claimed by defendants, section 43 of the act of February 27, 1913, applies, which we do not determine, an offending party may be fined not less than $50 nor more than $1,000 for his first offense, and not less than $100 nor more than $5,000 for each subsequent offense. In either event the attitude of the employer is no worse than that of the employé. The danger of an increase in the quantity of fine coal caused by shooting from the solid may, under the act of February 5, 1914 (104 Ohio L., 161), be wholly obviated, if the operator so elects, in that shooting of that character may not be done and is made a misdemeanor, unless the operator and a majority of his miners obtain from the commission, upon application, an order permitting it.

A violation of the provisions of section 6 is made a misdemeanor punishable by fine for each distinct offense in a sum not less than $300 nor more than $600. If the penalties are a separate part of the act, which we need not now determine, the objection to it on account of them is premature. Flint v. Stone Tracy Co., 220 U. S., 177. If they are not thus separate, they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer wishing to test the law will risk the possibilities of repeated violations of the commission-
31 ers' orders.

Every argument advanced to sustain the contention that

the act delegates legislative power to the industrial commission in violation of Sec. 1, Art. 2, of the state constitution was urged against the act providing a board of censor motion picture films, approved May 13, 1913, in the case brought by the Mutual Film Co. v. The Industrial Commission of Ohio, supra. To state our reasons for holding the present contention unsound as we do, would be to repeat in substance what was said to the same point in that case. We are content to abide by the conclusion there reached.

The claim that the act is in violation of section 16 of article 2 of the Ohio constitution which provides that "no bill shall contain more than one subject, which shall be clearly expressed in the title," is unavailing. But one subject is embraced in the act. Were it otherwise, we should follow the decisions of the state court and hold that the provisions of the constitution above quoted is directory and not mandatory. Ohio ex rel. v. Covington, 29 Ohio St., 102, 116.

In view of the above quoted amendments to the Ohio constitution, the present act's want of similarity to that considered in the Preston case and its general resemblance in its principal features to that of Arkansas, the instant case is ruled by McLean v. Arkansas and is well within German Alliance Insurance Co. v. Lewis, decided April 20, 1914, Sup. Ct. U. S. It is not repugnant to any constitutional provision, state or federal. The prayer for an interlocutory injunction is therefore denied. In order, however, to enable complainant to take an appeal in each of the suits directly to the Supreme Court of the United States, pursuant to Section 266 of the Judicial Code, and to apply to that court for orders of suspension or supersedeas, if it so desire, we have concluded to suspend the operation of the orders of denial herein for a period of fifteen days from the date of their entry.

J. W. WARRINGTON,
Circuit Judge.
J. E. SATER, *District Judge.*
JOHN M. KILLITS,
District Judge.

32 (*Order Overruling Plaintiff's Application for Interlocutory Injunction Entered May* 23, 1914, *Entered for the Court by Judge Killits, One of the Judges Sitting Therein.*)

No. 233. Equity.

RAIL & RIVER COAL COMPANY
vs.
WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio.

This cause having hitherto been argued before the court and submitted, and an opinion having been filed herein, signed by the judges of said court, which was constituted pursuant to Section 266, Judicial Code, in accordance with such opinion, it is ordered, adjudged and

decreed that the motion of the plaintiff for an interlocutory injunction suspending and restraining the enforcement,, operation and execution of the Act of the legislature of Ohio, entitled "An act to regulate the weighing of coal at the mines," approved February 17, 1914, be, and the same is hereby denied; to all of which the plaintiff excepts.

It is ordered that the operation of this order denying said application for an interlocutory injunction be, and the same hereby is, suspended for a period of fifteen days from this date, to enable the plaintiff to take an appeal to the Supreme Court of the United States, if it should so desire.

33 (*Preliminary Restraining Order, Entered May 23, 1914, by Honorable John W. Warrington, U. S. Circuit Judge; Honorable J. E. Sater, U. S. District Judge, and Honorable John M. Killits, U. S. District Judge.*)

No. 233. Equity.

RAIL AND RIVER COAL COMPANY
vs.
WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio.

This cause having been argued before and submitted to the court, consisting of Honorable John W. Warrington, Circuit Judge, Honorable John E. Sater, District Judge, and Honorable John M. Killits, District Judge,—such court having been constituted pursuant to Section 266 of the Judicial Code,—upon motion for an interlocutory injunction as prayed in the Bill; and such motion, after due consideration by such court, having been denied as appears by its per curiam opinion and order heretofore filed and entered in the cause; and such court having inadvertently and erroneously assumed that preliminary restraining order had been previously granted pursuant to Section 266 of the Judicial Code, and so provided for suspension of its order of denial herein for a period of fifteen days to enable complainant to take an appeal to the Supreme Court of the United States if it should so desire; now it is hereby ordered that a temporary restraining order be, and such order hereby is, granted as prayed in the bill of complaint herein until the 4th day of June, 1914 (on which day said order shall expire), for the purpose of enabling complainant, if it shall so desire, to appeal the cause to the Supreme Court of the United States and there apply for an order of suspension or supersedeas in the cause.

34 (*Petition for Appeal. Filed May 28th,* 1914.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

Petition for Appeal.

The above named plaintiff, feeling itself aggrieved by the order made and entered in this cause on the 23rd day of May, A. D. 1914, does hereby appeal from said order to the Supreme Court of the United States, in accordance with the provisions of Section 266 of the Judicial Code, for the reasons specified in the assignment of errors which is filed herewith, and it prays that said appeal be allowed, and that a transcript of the record, proceedings and papers upon which the said order was made, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays that the proper order, touching the security to be required of it to perfect its appeal, be made.

HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Attorneys for Plaintiff.

A. C. DUSTIN,
Of Counsel.

The foregoing petition is hereby granted and the appeal allowed upon giving bond, conditioned as required by law in the sum of $250.00.

JOHN M. KILLITS, *Judge.*

The issuance and service of a citation herein is hereby waived, this 28th day of May, 1914.

35 TIMOTHY L. HOGAN,
Attorney General of Ohio,
Attorney for Defendants.

CLARENCE D. LAYLIN,
ROBERT M. MORGAN,
Of Counsel.

(*Assignment of Errors. Filed May* 28, 1914.)

In the District Court of the United States, Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

Assignment of Errors.

And now comes the plaintiff, Rail and River Coal Company, and says that the order entered in the above cause on the 23rd day of May, A. D. 1914, is erroneous and unjust to the plaintiff because the court, composed of Judges Warrington, Killits and Sater, which in accordance with the provisions of Section 266 of the Judicial Code, heard the plaintiff's application for an interlocutory injunction herein, erred for the following reasons:

1. The District Court erred in denying the application of
36 the plaintiff made after due notice and hearing for an interlocutory injunction.

2. The District Court erred in holding that the act of the General Assembly of the State of Ohio, entitled "An act to regulate the weighing of coal at the mines," passed by the General Assembly on February 5, 1914, approved by the Governor of the State of Ohio on February 17, 1914, and filed in the Office of the Secretary of State on February 20, 1914, does not violate Section 1, of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state from denying any person of liberty or property without due process of law.

3. The District Court erred in refusing to hold that the said act constitutes an unwarranted and arbitrary interference with the right of the plaintiff and of others similarly situated to contract with their employees, and to manage their business of mining, producing and selling coal, according to their own judgment; and in refusing to hold that the said act thereby deprives the plaintiff, and others similarly situated, of liberty and property without due proess of law, in violation of the said Fourteenth Amendment.

4. The District Court erred in refusing to hold that the said act in conferring authority and power on the Industrial Commission of Ohio, and in requiring it to determine for each operator and each miner and loader in the state, who is paid by weight, the percentage of impurities unavoidable in the proper mining or loading of coal in cars, and the allowable percentage of slack and fine coal, thereby deprives the said operator and its employees of the right to determine, bargain and contract for the quality of coal to be produced

from said mines, and thereby deprives the plaintiff and others similarly situated of liberty and property without due process of
37 law, in violation of the said Fourteenth Amendment.

5. The District Court erred in refusing to hold that the said act in requiring the operator to accept and pay for the mining of coal of a quality fixed by the Industrial Commission of Ohio, interferes with the freedom of the employer to fix and determine the product of his mine, and interferes with the freedom and the right of the employer and the employee to contract with each other, and thereby deprives the plaintiff and others similarly situated of liberty and property without due process of law, in violation of the said Fourteenth Amendment.

6. The District Court erred in failing to hold that the said act denies to the plaintiff and others similarly situated the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and by Article 1 of the Constitution of the State of Ohio.

7. The District Court erred in holding that the General Assembly of the State of Ohio had authority to pass the said act under the police power of the said state.

8. The District Court erred in failing to hold that Sections 34 and 36 of Article 2 of the Constitution of the State of Ohio did not authorize the General Assembly to pass said act.

9. The District Court erred in that it failed and refused to follow the decisions of the Supreme Court of the State of Ohio, with respect to the extent and exercise of the police power of the said State, and the interpretation and construction of the Constitution of the said State.

10. The District Court erred in holding that the said act does not delegate legislative power to the State Industrial Commission in violation of Sections 1 and 26 of Article 2 of the Constitution of the State of Ohio.

11. The District Court erred in holding that the said act
38 does not violate Section 1, or any other section, of Article 1 of the Constitution of the State of Ohio.

12. The District Court erred in holding that the said act with respect to the penalties therein prescribed for violation thereof, does not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 16 of Article 1 of the Constitution of the State of Ohio.

13. The District Court erred in failing to find that the plaintiff, pending the final hearing in said court, would suffer irreparable injury and damage, if the enforcement of said act were not enjoined.

HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Attorneys for Plaintiff, Cleveland, Ohio.

(*Bond on Appeal. Filed May* 28, 1914.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendant-.

Bond on Appeal.

39 Know all men by these presents that we, Rail and River Coal Company, a corporation of West Virginia, as principal and the American Surety Company of New York, a corporation of New York as surety, acknowledge ourselves to be jointly indebted to Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as Members of and Constituting The Industrial Commission of Ohio, appellees in the above cause, in the sum of $250.00 conditioned that—

Whereas, on the 23rd day of May, A. D. 1914, in the District Court of the United States, for the Northern District of Ohio, Eastern Division, in suit pending in that court, wherein the Rail and River Coal Company was plaintiff, and the appellees above named were defendants, appearing on the Equity Docket as No. 233, an order or decree was rendered against said Rail and River — Company, and said Rail and River Coal Company having obtained an appeal to the Supreme Court of the United States and filed a copy thereof in the Office of the Clerk of this Court, to reverse the said order or decree, and issue of a citation thereon having been duly waived by the defendants.

Now, if the said Rail and River Coal Company should prosecute its appeal to the effect and answer all costs, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and effect.

RAIL AND RIVER COAL COMPANY,
By W. R. WOODFORD, *President.*
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By C. I. ZIMMERMAN, *Res. Vice-Pres.*

Attest:
H. LABET,
Res. Ass't Sec'y.

The Foregoing Bond on appeal is hereby approved.

JOHN M. KILLITS,
Judge of the U. S. District Court, Northern District of Ohio, Eastern Division.

40a (*Order Allowing Appeal, Entered May 28th, 1914, by Judge Killits.*)

No. 233. Equity.

RAIL AND RIVER COAL COMPANY
vs.
WALLACE D. YAPLE et al.

On motion of A. C. Dustin, Esq., solicitor and of Counsel for the complainant, it is ordered that an appeal to the Supreme Court of the United States, from the decree heretofore filed and entered herein on the 23rd day of May, 1914, be and the same is hereby allowed; and that a certified transcript of the record in accordance with the rules of practice of the Courts of Equity of the United States, November 4th, 1912, be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed in the sum of Two Hundred and Fifty Dollars ($250.00).

40 (*Precipe. Filed May 28, 1914.*)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,
vs.
WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

Precipe.

To the Clerk:

Please prepare transcript for appealing to the Supreme Court of the United States, under Section 266 of the Judicial Code, from the order made in the above entitled cause on May 23, 1914, by this court, denying the plaintiff's application for an interlocutory injunction, including in said transcript a copy of each of the following pleadings and documents.

1. Bill of Complaint.
2. Subpœna in equity bearing acceptance of service on behalf of defendants thereon.
3. Memorandum of opinion filed by Judges Warrington, Killits, and Sater on May 20, 1914.
4. Order overruling plaintiff's application for interlocutory injunction entered May 23, 1914.

5. Temporary restraining order granted May 23, 1914.
6. Petition for appeal and allowance.
7. Assignment of errors.
8. Appeal bond.
9. Precipe.

HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Attorneys for Plaintiff.

41 (*Certificate of Clerk.*)

In the District Court of the United States, Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL & RIVER COAL COMPANY
vs.
WALLACE D. YAPLE et al.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that the foregoing pages contain a full, true and complete copy of the record in the above entitled cause, in accordance with the precipe for transcript filed by the Appellant, Rail and River Coal Company, including the petition for appeal, assignments of error and the memorandum opinion of the Court.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, Ohio, this 29th day of May, A. D. 1914, and in the 138th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*
By R. C. DEAN,
Deputy Clerk.

Endorsed on cover: File No. 24,255. N. Ohio D. C. U. S. Term No. 1104. Rail and River Coal Company, appellant, vs. Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio. Filed June 4th, 1914. File No. 24,255.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1913.

No. ~~1045~~ 513

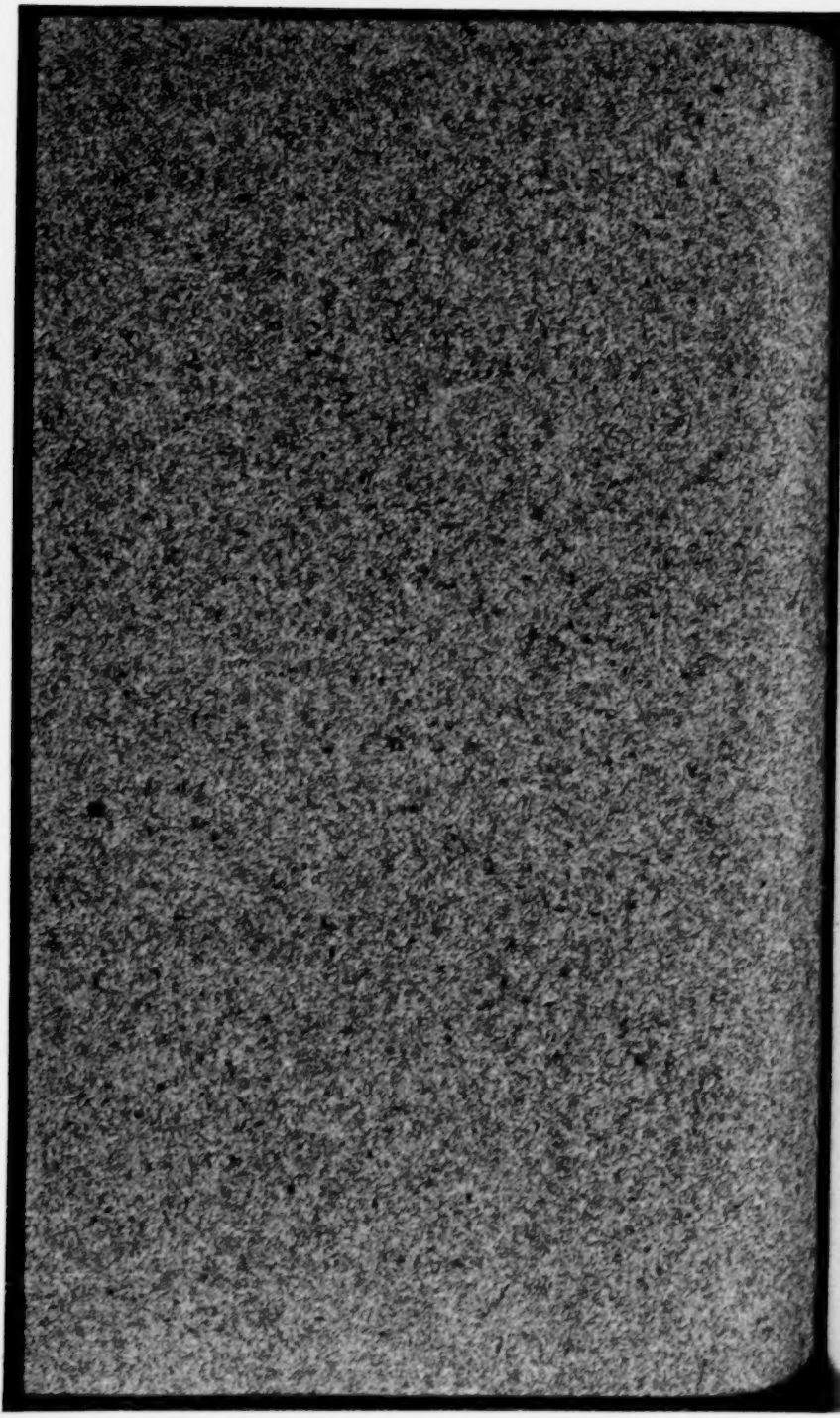
RAIL AND RIVER COAL COMPANY, PLAINTIFF-APPELLANT,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO, DEFENDANTS-APPELLEES.

RECORD BY STIPULATION ON MOTION FOR TEMPORARY RESTRAINING ORDER.

A. O. DUSTIN,
Attorney for Appellant.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No.

RAIL AND RIVER COAL COMPANY, PLAINTIFF-APPELLANT,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO, DEFENDANTS-APPELLEES.

MOTION FOR TEMPORARY RESTRAINING ORDER.

Now comes Rail and River Coal Company, appellant, by attorneys, representing to the court that it has appealed the Supreme Court of the United States from an order retofore entered herein by the District Court of the United ates for the Northern District of Ohio, Eastern Division, ying appellant's application for an interlocutory injunc-n, which appeal has been allowed by said district court, re-

spectfully moves the court to grant a temporary restraining order herein, pending the hearing and decision of such appeal by this court.

RAIL AND RIVER COAL COMPANY,
By HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Its Attorneys.

(NOTICE.—Acknowledgment omitted.)

Copy.

IN THE SUPREME COURT OF THE UNITED STATES.

RAIL AND RIVER COAL COMPANY, *Plaintiff,*
vs.
WALLACE D. YAPLE ET AL., *Defendants.*

Affidavit in Support of Application for Restraining Order.

THE STATE OF OHIO,
Cuyahoga County, ss:

Charles E. Maurer, being first duly sworn, deposes and says that he is forty-nine years of age; that he is president of the Glens Run Coal Company and the St. Clair Coal Company, which operate in the State of Ohio, and is also president of the Standard Pocahontas Coal Company, which operates in West Virginia; that said companies produce approximately nine hundred thousand tons of coal per year; and that affiant has been familiar with the coal business in Ohio, Pennsylvania, West Virginia, and Indiana for the period of fifteen years last past.

Affiant further says that he has read the bill filed in this case; that there is invested in the coal mining industry in the

State of Ohio fully one hundred million dollars; that such business gives employment directly to upwards of 45,000 persons to whom wages were paid in the year 1913 in excess of twenty-eight million dollars, and indirectly gives employment to many thousands of other persons; that there was produced from the mines in Ohio during said year upwards of thirty-six million tons of bituminous coal.

Affiant further says that all the coal in Ohio and Indiana was produced by employees who are members of an organization known as the United Mine Workers of America, and that of the eighty-two million tons of bituminous coal produced in 1913 in the western part of the State of Pennsylvania approximately forty million tons were produced by members of said organization, and that of the coal mined in West Virginia approximately ten million tons were produced by mines employing union labor.

Affiant further says that for upwards of twenty years to affiant's knowledge, and to affiant's best belief from practically the beginning of the business of coal mining in the State of Ohio, the coal mines in Ohio have been operated on what is known as the screen-coal basis.

Affiant further says that for many years it has been the practice at stated intervals, either once a year or once every two years, for the coal operators who employ union miners to meet in convention with officers and representatives of said miners' union and fix a scale of wages to be paid at mines employing union labor for certain definite periods; and that the contract entered into a little over two years ago was for a period of two years, expiring on April 1, 1914. Said contract, as well as several of the contracts theretofore made, provided for the payment of miners and loaders of coal upon the screen-coal basis in the State of Ohio, and, generally speaking, in Pennsylvania and Indiana. Where miners and loaders are being paid on the screen-coal basis the weight of the coal is ascertained by passing the same over a screen, the bars of which are, as applied to Ohio, Pennsylvania, and Indiana, one and one-fourth inches apart.

Affiant further says that the bituminous coal produced in Pennsylvania, Ohio, and Indiana, is sold under keenly competitive conditions, and that such coal and coal produced in West Virginia reaches approximately the same markets; that in the year 1913 twenty-three million tons of bituminous coal produced in Ohio, Western Pennsylvania, and West Virginia, were shipped via vessel up the Great Lakes, all of which were sold on the same market and under competitive conditions.

Affiant further says that the margin of profit in the coal business for many years has been very small; that according to statistics prepared by Dr. E. W. Parker, of the United States Geological Survey, the profits in coal mining in the year 1909 were 2.5 per cent of the capital actually invested, or, as stated by Dr. Parker—

> "The average value per ton of all the bituminous coal produced in the United States (1909) was $1.07, the costs averaged a fraction of a cent over $1.00, so that the margin of profit to cover interest, depreciation, and amortization was a little less than 7 cents a ton. * * *
>
> "Pennsylvania, by long odds the most important producer, with an output of 137,300,000 tons, showed a total of expenses of $117,440,000 and of value of $129,550,000, a balance on the profit side of a little over $12,000,000, or about 3¼ per cent on the capital invested. * * *
>
> "The four competitive States, West Virginia, Illinois, Ohio, and Indiana, which rank second, third, fourth, and fifth, respectively, in producing importance, all show such narrow margins between income and outlay that profits are visible only with a microscope. The figures follow:

	Value of product.	Expenses.	Difference.
West Virginia..	$44,344,067	$43,024,716	$1,319,351
Illinois	53,030,545	51,697,504	1,333,041
Ohio	27,353,663	27,153,497	200,166
Indiana	15,018,123	14,906,831	111,292"

and since said date there has been little or no change in the situation.

Affiant further says that in mining coal the efforts of the operator are directed to produce as large a per cent of lump coal as possible; that there is of necessity in the production of coal some slack coal produced, which is generally marketed under cost; that slack coal sells on an average of 45 cents per ton less than coal screened over a 1¼-inch screen, 35 cents per ton less than coal screened over a ¾-inch screen, and 25 cents per ton less than the ordinary run-of-mine coal as produced without a screen.

Affiant further says that the experience of operators in States where methods of mining have been changed from a screen-coal basis to run-of-mine basis shows that the amount of slack coal produced has very materially increased,—in some cases the amount of slack coal has practically doubled. so that the market value of the product is very materially reduced by such change in the methods of mining.

Affiant further says that just prior to the expiration of the last agreement with the United Mine Workers various meetings were held by the operators and the representatives of said union in an effort to reach an agreement relative to the mining of coal for two years following April 1, 1914; that after many negotiations an agreement was entered into between said union and the operators in respect to mining coal in Western Pennsylvania, Indiana, and Illinois, but no agreement was made with respect to mining coal in Ohio, and the mines in the State of Ohio are and have been closed since April 1st; that the wage agreement so entered into was substantially a renewal for a period of two years of the old agreement expiring on April 1, 1914, in said States.

Affiant further says that the operators of Ohio were ready and willing to continue their old agreement for the further period of two years, and such an agreement would have been entered into but for the statutes of the State of Ohio changing the method of mining and weighing coal referred to in the bill in this case.

Affiant further says that while theoretically it may be possible to mine coal at so much per day, or so much per week, it is the universal practice wherever the United Mine Workers are employed to exact payment by weight for all miners and loaders of coal, and the members of such union refuse to work in any other way.

Affiant further says that as a matter of fact payment by the day or week is not practicable in a business such as coal mining, where the working places are widely separated and incapable of proper supervision.

Affiant further says that the markets for Ohio coal require the production of large amounts of lump coal, and that the cost of changing the tipples and loading devices in use in the mines of the State of Ohio, so as to weigh the coal before the same is screened, would entail a large expense upon the plaintiff to readjust its tipples and mining devices, and would entail an expense to the operators of Ohio for that purpose of upwards of one million dollars.

Affiant further says that while theoretically it may be possible to change the methods of weighing coal from the screen-coal basis to a run-of-mine basis, and change the method of paying employees from one basis to the other, as a practical proposition such changes cannot be made without great loss and injury; that the present law in Ohio was enacted by the legislature of said State upon the demand of the United Mine Workers, and that if adopted by the operators in Ohio as a method of weighing coal and paying employees it will be impossible to restore the former method of weighing and paying for coal except after strikes, lockouts, and labor troubles involving great loss and expense to both the operators and their employees, which is to be deprecated, and which should be avoided until the ultimate constitutionality of this law is determined.

Affiant further says that the contracts heretofore made prior to April 1, 1914, between said United Mine Workers and operators in the States of Pennsylvania, Ohio, and In-

diana, were in each case the result of long and protracted efforts to adjust the varying conditions to a proper competitive basis, and that any attempt to establish a proper competitive run-of-mine basis for the mines in Ohio when coal is being produced and paid for in Western Pennsylvania and Indiana on a screen-coal basis is a matter of the greatest difficulty. All attempts that have been made to that end since the passage of the law complained of in this bill have failed, and as the result of such failure all the mines in Ohio are now closed down, as aforesaid, and all said employees are idle.

Affiant further says that the law of Ohio places upon the coal operators of Ohio a great disadvantage, in that the Industrial Commission of Ohio is authorized to fix and make public the per cent of slate, rock, dirt, and other impurities which may be loaded with the coal, and that such determinations, being matters of public notoriety, will be used against the coal operators of Ohio in all markets where the coal of Ohio comes into competition with the coal produced in other States, which will force the Ohio coal to be sold at a very much less price than if mined in the ordinary way and under rules and regulations prescribed by the operators themselves.

Affiant further says that in many of the coal mines in Ohio the coal seam contains one or more dirt or slate bands, and that it is only by the most constant and unremitting vigilance on the part of the operators that coal can be produced in a marketable condition, and that the fixing by the Industrial Commission of Ohio of certain percentages of dirt and other impurities which may be properly mined with the coal, and the taking from the operator the right to determine how his coal shall be mined, will necessarily lead to great carelessness and indifference on the part of the miners, and that the method of control prescribed by said law is wholly impractical and will not protect the operator against a product being produced from his property which he cannot

market in competition with coal produced in the other States mentioned.

Affiant further says that coal has been produced and paid for in Ohio for more than thirty years upon the lump-coal basis, and that no injury can result to the miners in the State of Ohio, or to the State of Ohio itself, by continuing such condition until a full hearing can be had and the validity of the legislation attacked in this bill finally determined.

Affiant further says that experience has shown that when miners and loaders are paid on the screen-coal basis they will exercise great care in the method and manner of shooting coal, but that when they are paid on the mine-run basis there is no such incentive to mine good coal, the consequence being that much larger charges of powder are used and less care exercised, and that as a result thereof the dangers of mining have been very much increased.

Further deponent saith not.

CHAS. E. MAURER.

Sworn to before me and subscribed in my presence, this 29th day of May, 1914.

[SEAL.] P. L. KLEIN,
Notary Public.

Copy.

(Caption omitted.)

THE STATE OF OHIO,
Cuyahoga County, ss:

W. R. Woodford, being first duly sworn, deposes and says that he is president of the Rail & River Coal Company, plaintiff herein; that he has read the affidavit of Charles E. Maurer, and that the facts therein as stated are true.

Affiant further says that to rebuild and rearrange the tipples at plaintiff's mines so as to handle the coal there-

from in a practicable manner and comply with the law of Ohio would cost the plaintiff not less than ten thousand dollars, and a similar amount to change back in event said law of Ohio is ultimately held unconstitutional.

Further deponent saith not.

W. R. WOODFORD.

Sworn to before me and subscribed in my presence this 29th day of May, 1914.

[SEAL.] P. E. KLEIN,
Notary Public.

STATE OF OHIO,
Cuyahoga County, ss:

D. J. Jordan, being first duly sworn, deposes and says that he is forty-three years of age and is a resident of Cleveland, Ohio, and has been engaged in the coal business practically all his lifetime; that after the appointment of the Ohio Coal Mining Commission by the Governor of Ohio, under the joint resolution referred to in this case to investigate and report an equitable method of weighing coal, etc., affiant was employed by the coal operators of Ohio to go with said commission, and accompanying said commission and affiant was one Percy Tetlow, who, at that time, was a member of the Ohio Legislature; that after the testimony was taken and the matter was being considered by the commission affiant and said Tetlow both made arguments before said commission as to the proper report for them to make to the Ohio Legislature; that in the argument made by said Tetlow he, in affiant's hearing, said in substance:

If this commission will recommend a mine-run law for Ohio we guarantee you that there will never be another screen-coal contract entered into by the miners in the competitive fields, meaning thereby that if the commission would recommend to the legislature and the legislature should adopt a screen-coal law for Ohio that Ohio would not

be allowed by the United Mine Workers to be put at a disadvantage in competition with the competitive States.

At the time said Tetlow was engaged in said work, and at the time he made said statements, he was not only a member of the legislature, but was an official of the United Mine Workers.

Further affiant saith not.

D. J. JORDAN.

Sworn to and subscribed in my presence by said D. J. Jordan the 1st day of June, 1914.

P. E. KLEIN. [SEAL.]
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

RAIL & RIVER COAL COMPANY, *Plaintiff,*
vs.
WALLACE D. YAPLE ET AL., *Defendants.*

Affidavit in Opposition to Application for Restraining Order.

THE STATE OF OHIO,
Franklin County, ss:

John M. Roan, being first duly sworn, deposes and says that he is the duly appointed, qualified, and acting chief deputy and safety commissioner of the Division of Mines of the Industrial Commission of Ohio; that he is 55 years of age; that at the age of nine and one-half years he commenced to work in and about a coal mine; that he has served in practically every employment or position in and about coal mines in the State of Ohio from that time until he became a coal operator and superintendent as hereinafter stated, such positions being those of trapper, track layer, practical miner, engine runner, and, in fact, all related positions; that he

was a practical miner in Ohio coal mines for a period of approximately sixteen years; that in addition to serving in the aforementioned employments and positions he has been an operator of coal mines in the States of Ohio and West Virginia, holding the following managerial positions:

Between the years 1884 and 1901 affiant, together with others associated with him, owned and operated a mine in Perry County, Ohio, known as the Martin and Roan mine; at the date last mentioned affiant and his associates sold said mine to The Sunday Creek Coal Company, a large corporation operating more than sixty mines located in the States of Ohio and West Virginia.

In the year 1900 affiant was employed by the said The Sunday Creek Coal Company as general superintendent of its properties in the Hocking and Sunday Creek fields in the State of Ohio, located in Hocking, Perry, and Athens counties in said State; that in such capacity affiant was in charge of 34 mines owned and operated by said The Sunday Creek Coal Company; in 1901 the said The Sunday Creek Coal Company purchased a number of mines in the State of West Virginia and at the same time purchased the Martin and Roan mine, of which affiant was part owner as aforesaid; at that time affiant was employed by The Sunday Creek Coal Company as manager of its practical operations, both in Ohio and West Virginia, and as such gave all his time to The Sunday Creek Coal Company and had charge of all of its mining operations of whatsoever character and wherever located; in the year 1907 affiant was employed by the Clinchfield Coal Corporation in a capacity which required him to develop mining properties located in the State of Virginia upon 316,000 acres of coal land located in said State; that he remained in the employ of said Clinchfield Coal Corporation for a period of four years, during which he opened up on the property of said corporation ten bituminous coal mines.

In the year 1911 affiant resigned the position last described

and organized a corporation under the name of the Log Mountain Coal Company, which said company acquired the ownership of five bituminous coal mines located in Belle County, Ky.; the said company operated and is still operating all of said mines, and affiant at that time became general manager of said company; affiant continued in the position last described for a period of about one year, when he was forced to abandon the same because of failing health. Affiant returned to Ohio for the purpose of regaining his health, and in the year 1913 was appointed by the Hon. James M. Cox, governor of said State, as a member of the Ohio Coal Mining Commission, being a commission appointed under authority of an act of the General Assembly of the State of Ohio for the purpose of investigating and reporting upon the conditions of coal mining in the State of Ohio and the method of compensating the miners for their services. A copy of the report of said commission is attached hereto and made a part hereof, marked "Exhibit A."

Since December 26, 1913, affiant has been connected with the Industrial Commission of Ohio and is now serving in the capacity first above stated.

Affiant said that he has read the affidavit of Charles E. Maurer filed in support of the application for a restraining order in the case of the Rail & River Coal Company *vs.* Wallace D. Yaple *et al.*

Affiant says that the statement on page 2 of said affidavit to the effect that "from practically the beginning of coal mining in the State of Ohio the coal mines in Ohio have been operated on what is known as the screen-coal basis" is not strictly correct; that as a matter of fact and to affiant's personal knowledge there was no single and uniform basis of compensating coal miners and loaders in use in the State of Ohio prior to the year 1883, but that prior to said date the several coal mines then operated in the State of Ohio made use of different bases, such as the car measure, the bank measure, the run of the mine, weight measure, and the

screen basis, with the use of screens of various lengths and differing meshes; in the year 1883, under an act of the Legislature of the State of Ohio, a commission was appointed to investigate the subject of the compensation of miners. The said commission and its report are referred to at page 33 of the attached report of the Ohio Coal Mining Commission. The said commission of 1883 recommended in its report the use of the screen system and the prescribing of a standard screen. Since that time the recommendations of said commission have been, by agreement, followed throughout the State of Ohio, with very few exceptions, and the statement of Mr. Maurer would hold good from the date mentioned to the present time. Affiant says, however, that the present-day conditions in the bituminous coal-mining industry in the State of Ohio are fundamentally different from those which existed when the commission of 1883 made its report, and when what is known as the screen-coal basis of compensation was adopted uniformly in the State, in this to wit:

In 1883, and for some years thereafter, there was no market for Ohio bituminous coal which would pass through a three-eighths-inch screen. In the opinion of the commission of 1883 this fact constituted a sufficient reason for the adoption of the screen-coal basis of compensation and the rejection of what is known as the mine-run basis of such compensation. At the present time and for several years last past there has been a market for all coal of standard purity which can be brought out of an Ohio coal mine, and coal which goes through the screen is now sold as well as that which passes over the screen; therefore the condition which led to the adoption of the screen-coal basis no longer exists; while the condition, the absence of which precluded the adoption of the mine-run system in 1883, has now arisen, viz., the marketability of all coal regardless of its ability to pass over the screen.

Affiant further says that the statement of Mr. Maurer

at page 2 of his affidavit relative to the nature of the contracts made between the coal operators and the miners' union is somewhat misleading; that as a matter of fact the territory of the State of Ohio and the extreme western portion of the State of Pennsylvania constitutes the only part of the entire bituminous coal fields of the United States in which a strict and exclusive screen-coal basis has been agreed upon as a method of compensation. In the State of Indiana, referred to by Mr. Maurer, the agreement between the operators and the miners' union provides for a double standard, both screen and mine run and both standards are in actual use in that State. The same, or the exclusive use of the mine-run system, is true of all other bituminous coal fields wherein the miners are organized and affiliated with the United Mine Workers of America, including all fields which are in direct competition with the Ohio fields.

Affiant further says that Mr. Maurer's further statement on page 2 of his affidavit relative to the competition of Ohio bituminous coal with that produced in Pennsylvania, Indiana and West Virginia is somewhat misleading. Affiant says that it is true that Ohio, and particularly Eastern Ohio, in which the operations of the companies with which Mr. Maurer is connected are conducted, is in competition with Pennsylvania, Indiana and West Virginia; also with Illinois, which Mr. Maurer does not mention (and in which field the mine-run basis of compensation is exclusively used); affiant says that to his personal knowledge the different operators in the Eastern Ohio field are in competition primarily with each other rather than with the operators in outlying fields or States; that coal from this district does not compete with coal from other States until it reaches Cleveland. At this point Ohio coal is offered for sale at 15 cents a ton less than Pennsylvania coal, and on the Great Lakes, including the upper lake ports, as affiant is informed and believes, Eastern Ohio coal is offered at 15 cents a ton lower than Pennsylvania coal and at 5 cents a ton lower than coal

produced in the Hocking Valley field, which is in the State of Ohio. Affiant has no knowledge of any West Virginia coal known as splint coal, being offered in any market at a price lower than 5 cents a ton less than Hocking Valley coal, which would be the same price as Eastern Ohio coal.

With respect to the statement of Mr. Maurer in his affidavit at page 3 to the effect that slack coal is "generally marketed under cost," this affiant says that from his knowledge of the coal-mining business, the truth of this statement cannot be established or overthrown by any absolute proof, because all depends upon the method of book-keeping and calculating cost of production; however, to the best of his knowledge the cost of production is and only can be figured on the basis of the total product, that is, on a mine-run basis, because it is impossible separately to compute and ascertain, except by some arbitrary method, the respective cost of production of lump coal, slack coal, and the various intermediate grades. When coal is separated into the various grades and sold otherwise than as run of mine, *i. e.*, as lump, nut, pea, slack, etc., the question as to whether or not each grade is sold at a "profit" can be figured only on what might be termed the average cost of production, *i. e.*, the cost of producing the whole product on the mine-run basis. As a matter of course, the higher-priced grades will appear on such a basis of computation to be sold at a higher profit, while the slack will appear, on such a basis, to be sold below cost of production; but the average of the coal sold at various grades and otherwise than on the mine-run basis will always be, affiant believes, in excess of the actual cost of production.

Respecting Mr. Maurer's statement on pages 3 and 4 of his affidavit, to the effect or carrying the inference that under a run-of-mine basis the amount of slack coal produced will be practically doubled, based upon the experience of other States, this affiant says that to the best of his knowledge and belief there is no basis whatever for any such

statement. It is true that the relative amount of fine coal will undoubtedly be slightly increased on the run-of-mine basis, but this increase, in affiant's opinion, would come from the fine coal that is now being left in the mine and thrown back into the refuse pile. Affiant states positively, as a result of his personal experience and the investigations made by him as a member of the Ohio Coal Mining Commission, that the leaving of fine coal in the mine is a great economic waste of fuel and, furthermore, adds to the danger of operating the mine.

Affiant further says that under the present screen basis the manner in which the coal is passed over the screen is a matter of continuous controversy between miners and operators, as a result of which miners have successfully insisted that the coal be allowed to pass over the screen in a continuous, uninterrupted stream, so that much fine coal, adhering to or carried by the lump coal, has been passing over the screen. Such fine coal so passing over the screen with the lump coal has the effect of deteriorating the quality of the lump coal as such and at the same time reducing the *apparent* proportion of the fine coal in the whole carload. Affiant is of the opinion that under a run-of-mine basis the miners would have no reason to object to such methods of screening as will effectively separate the fine coal from the higher grades. The result of this would naturally be to increase the apparent proportion of fine coal produced by the mine, at the same time enhancing the quality of the higher grades, but in reality very little more fine coal would be produced.

Affiant says that, aside from the two aforementioned reasons for the production of more fine coal under a run-of-mine basis than has been produced under the screen basis, he knows of no practical reason tending to a production of an undue amount or proportion of fine coal. So far as Mr. Maurer's statement to the effect that the amount of slack would be "practically doubled" or "very materially in-

creased" is concerned, affiant has to say that he heard the said Charles E. Maurer on June 2, 1914, at a convention of miners and operators held in the city of Columbus, Ohio, say publicly that in his opinion under a mine-run basis the increase in the relative amount of fine coal would be not less than 6 nor more than 12 per cent of the total output, stating positively that he believed that 12 per cent would be the largest possible increase.

Respecting Mr. Maurer's statement at page 4 of his affidavit, in reference to the efforts which have been made to renew the wage scale agreement from April 1, 1914, applicable to the Ohio field, this affiant says that he has talked to numerous miners, members and officials of the United Mine Workers of America, and has heard them repeatedly express themselves in the most positive terms, both publicly and privately, to the effect that the Ohio miners would not renew the agreement of 1912-'14, providing for the screen basis of compensation, under any circumstances, whether the recent act of the Ohio Legislature be held constitutional or not; that, other means of securing the run-of-mine basis failing, they would wage industrial warfare in order to secure what they believed to be their rights. So that affiant believes that Mr. Maurer's statement to the effect that the old agreement would have been continued for a further period of two years but for the statutes of the State of Ohio changing the method of mining and weighing coal referred to in the bill in this case, has no foundation whatever in fact.

Affiant further says that Mr. Maurer's estimate of the cost of changing the tipples and loading devices at present in use in the mines in the State of Ohio is evidently based upon a misconception as to the meaning and effect of the law set forth in the bill in this case. Mr. Maurer's statement is that the change to which he refers is such as to make possible the weighing of the coal "before the same is screened." Affiant says that there is nothing in the new law, which was prepared by the commission of which he

was a member, requiring the coal to be weighed before it is screened. The operator is permitted to screen his coal and remove the impurities, providing he pays for all the permissible coal contained in the mine car. The screens may be used as they are at the present time and the lump coal and fine coal weighed separately. No change whatever in the tipple is necessary to be made excepting the installation of hopper scales to weigh the fine coal. The cost of such installation would be betweeen one hundred and twenty-five dollars and one hundred and fifty dollars for each tipple, which would be from twelve thousand to twenty-one thousand dollars for the State of Ohio.

Affiant says that the changes which he speaks of are the only ones absolutely necessary, and that if Mr. Maurer has in mind other changes for the purpose of producing higher grades of coal, his figures do not relate to such changes.

Referring to Mr. Maurer's statement on page 6 of his affidavit relative to the attempts that have been made to establish a proper competitive run-of-mine basis for all mines in Ohio, this affiant refers again to the statement hereinbefore made relative to the attitude of the miners toward the renewal of the screen basis.

Affiant says that he has noted Mr. Maurer's objection to the determination by the Industrial Commission of Ohio of the allowable percentage of impurities which may be loaded with coal on the ground that the publication of such a percentage will work a detriment to Ohio coal wherever it comes into competition with coal produced in other States. Affiant, from his knowledge of the coal-mining industry in this and other States, and the investigations made by him as a member of the Coal Mining Commission of Ohio, states that there is a well-known practice on the part of miners and operators alike, existing throughout the bituminous coal fields of the United States, to market impure coal during times of great demand; that the impurities which occur in coal seams throughout the bituminous

coal fields are similar, so that Ohio coal is no more likely to have such impurities in it than is the coal produced in any other State; that so far from the standardization of the quality of Ohio coal constituting a detriment to the Ohio operators in the markets where that coal competes with the coal of other States, affiant is of the opinion that it will prove a positive advantage to them, in that Ohio coal will virtually be sold under the law and the regulations of the Industrial Commission upon a guaranteed standard of purity, whereas coal from other States will not be marketed under such conditions unless the legislation of other States is conformed to that of Ohio.

Relative to Mr. Maurer's statement that no injury could result to the miners in the State of Ohio or to the State of Ohio itself by continuing existing conditions until a full hearing can be had and the validity of the legislation attacked in the bill filed in this case finally determined, affiant says that he is convinced that there is not the remotest possibility of coal ever being produced again in the State of Ohio upon the coal-screen basis. The granting of a temporary restraining order in this case will not have the effect of reopening the coal mines; on the contrary, it will serve only to encourage a small number of operators in the State of Ohio in an attitude which they have assumed (and which is not followed by the majority of the operators in said State), viz: the attitude of insisting upon the screen basis and resisting the adoption of the run-of-mine basis, whether by agreement or under the sanction of legislation. So long as such operators continue in this attitude and the miners continue in the attitude which they have assumed, as affiant has hereinbefore stated, the mines will not be operated and the miners in the State of Ohio and the public generally will suffer very serious hardships.

Affiant further says that a convention of miners and operators in Ohio and other fields was held in the cities of Philadelphia and Chicago in the month of April, 1914, and

at such conventions the efforts referred to in Mr. Maurer's affidavit, looking toward wage scale agreements for the two years beginning in 1914, were made. Affiant has talked with Mr. Maurer and with other operators and with officials of the United Mine Workers of America respecting the proceedings of said conventions, and upon information and belief says that the mine operators in the Ohio field offered to the miners at such conventions a wage scale based upon the separate weighing of lump and fine coal, but providing compensation for all the coal brought out of the mine, which is all that the legislation complained of in this action requires. Affiant believes that said offer so made by the operators was entirely voluntary on their part and was made without reference to the legislation involved in this case. Affiant is informed that said offer was rejected by the miners because of the scale of compensation provided for therein.

Affiant further says that there is at the present time a convention of miners and operators in the Ohio field being held in the city of Columbus; that Mr. Maurer, who makes affidavit in this case, attended said convention and acted as spokesman and representative of the operators; that affiant attended said convention and heard the said Mr. Maurer on June 2, 1914, offer on behalf of the operators to the miners a certain wage scale based on the run-of-mine basis, conditioned upon the privilege of going back to the screen-coal basis if the present litigation should terminate favorably to the operators; but said proposal was rejected by the miners, whether because of the annexation of the condition or because of the amount of compensation affiant is unable to state.

Affiant refers the court generally to the contents of the report of the Ohio Coal Mining Commission attached hereto, in which many of the matters to which Mr. Maurer and affiant refer, are quite fully discussed. Further deponent saith not.

——.

Sworn to before me and signed in my presence this 3rd day of June, A. D. 1914.

——— ———,

Notary Public in and for Franklin County, Ohio.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity.

RAIL AND RIVER COAL COMPANY, *Plaintiff,*

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND THOMAS J. DUFFY, *as Members of and Constituting The Industrial Commission of Ohio, Defendants.*

Bill.

To the Honorable the District Judges of the Northern District of Ohio, Eastern Division:

Rail and River Coal Company, a corporation, brings this, its bill of complaint, against Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, and thereupon said plaintiff complains and alleges:

I.

Said plaintiff is and has been for a long time past a corporation organized and existing under the laws of the State of West Virginia, and is a citizen of said State of West Virginia, and a resident thereof.

II.

That the said defendants, Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, are citizens and residents

of the State of Ohio, defendant Wallace D. Yaple, residing at Chillicothe, Ohio, defendant Mathew B. Hammond, at Columbus, Ohio, and defendant Thomas J. Duffy, at East Liverpool, Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this court.

Said defendants are the duly appointed, qualified and acting members of The Industrial Commission of Ohio, having been appointed as such members under and pursuant to an act of the Legislature of the State of Ohio, entitled "An act creating The Industrial Commission of Ohio," passed March 12, 1913, approved by the Governor of said State March 18, 1913, and duly filed in the office of the Secretary of State on March 20, 1913. Said defendant, Wallace D. Yaple, is chairman, and said Mathew B. Hammond is vice-chairman of said commission. Said act is set forth at length in the Session Laws of the State of Ohio for the year 1913, volume 103, pages 95 to 110, both inclusive, to which act, for the full text thereof, complainant begs leave to refer as fully as though the same were at length incorporated herein.

That under and by the terms of section 22 of said act it is made the duty of said Industrial Commission, and it is given the power, jurisdiction and authority on and after the first day of September, 1913, to administer and enforce the general laws of the State of Ohio relating to mines, manufacturing and other establishments. Under the provisions of sections 18, 19, 20, 21, 22, and 35 of said act, said Commission is given extensive inquisitorial powers, and it is made the duty of all employers to furnish to said Commission information pertaining to their private business affairs, to enable it to carry into effect the provisions of said act and the orders of said Commission made thereunder, and said employers are required to make specific answers under oath to all questions submitted to them by said Commission, and to give said Commission access to their establishments and places of business. Under the provisions of

section 36 of said act said Commission is given authority to direct the prosecution of any action, proceeding, investigation, hearing or trial relating to matters within its jurisdiction, and upon the request of said Commission it is made the duty of the attorney general of Ohio or the prosecuting attorneys of the various counties in said State to aid said Commission and prosecute under the supervision of said Commission all necessary actions or proceedings for the enforcement of said act and for the punishment of all violations thereof.

III.

Said plaintiff is now and for many years last past has been actively engaged in the State of Ohio in the business of mining and selling coal, and now owns and for a long time past has owned in said State a large acreage of coal lands, consisting approximately of 32,000 acres, of the value of more than $1,000,000, upon which said lands said plaintiff has four coal mines properly developed, in which it employs upward of 2,000 persons, and from which said mines said plaintiff's average daily production is about 2,800 mine cars of two tons each of coal; that among said employees of plaintiff are about 1,700 persons who are paid on the basis of the ton for mining or loading coal.

IV.

Plaintiff further shows to the court that the business of coal mining in the State of Ohio is very large; that there are about six hundred (600) coal mines in said State, in which there are employed upwards of 45,000 persons; that upwards of 36,000,000 tons of coal were produced in the year 1913, and there was expended in wages to said employees in said year upwards of $26,000,000.

V.

Plaintiff further shows to the court that Western Pennsylvania, the States of Illinois and Indiana are likewise large producers of coal; that the mines located in these States are in close competition with each other and with the mines in the State of Ohio in the sale of the coal produced by their respective properties; that a great majority of the operatives engaged in the coal-mining business in said States are members of an organization known as The United Mine Workers of America. That for many years last past it has been the custom for said mine operatives, through their representatives in said organization, under arrangements made with the various coal operators in the said States, to enter into contracts with said operators for the period of two years, whereby the interests of said operatives and their employers have been subserved by securing reasonably uniform wages for the different kinds of labor performed in said mines; that the last agreement entered into was for the period of two years, expiring on April 1, 1914.

That it has been for many years last past the custom and practice of large users of coal, such as railroads and large manufacturing concerns, to make contracts for their fuel requirements by the year, and that many of said contracts expired about April 1, 1914, or will expire in the immediate future, and practically all of them prior to May 20, 1914.

VI.

Plaintiff further shows to the court that the wage agreement referred to, which expired April 1, 1914, as well as several of said agreements theretofore made, covering the wages of such mine operatives as are paid by the ton in the said States of Pennsylvania, Ohio, and Indiana, provided for the screening of coal and for payment of wages at a cer-

tain price per ton for lump coal, to wit: such coal as would pass over a bar screen of certain dimensions, wherein the bars were 1¼ inches apart; of said four States, the mines in said State of Illinois alone operating upon any other basis, except that in the State of Indiana the operators, at their option, paid on a mine-run basis also, and plaintiff states to the court that said method of screening coal and paying the miners and loaders thereof upon the basis of such coal as will pass over said screen is designed and well calculated to induce carefulness in mining, in that said loaders and miners exercise greater care in the manner in which charges of powder are placed to break down said coal, and in the manner in which said coal is loaded after the same is broken down, and the safety of the operatives is much enhanced because of the better condition of the roof of the mines, growing out of the smaller charges of powder used therein.

That for the reasons aforesaid, those engaged in the mining business operate their mines more economically and in a safer manner, and coal of a better grade is produced when the miners and loaders are paid upon the lump-coal basis.

VII.

Plaintiff further says that by section 970 of the General Code of Ohio the owners and operators of coal mined in said State are required to permit their mine operatives to employ, and it is the universal custom in said State for such operatives to employ, a representative known as check weighman, whose duty and right it is to examine the scales and screening apparatus and machinery at the mine, and see the coal weighed and check such weights, and make a correct record thereof. By this law the operatives are protected and secured against any false weight or improper screening of their coal, and from any improper deductions from the coal mined or loaded by them.

VIII.

Plaintiff further shows to the court that on the 20th day of May, A. D. 1914, there will become effective a certain act of the General Assembly of Ohio, known as Senate Bill No. 3, entitled "An Act to Regulate the Weighing of Coal at the Mines," which was duly passed by the General Assembly of Ohio on or about February 5, 1914, approved by the Governor of the State of Ohio on February 17, 1914, and filed in the office of the Secretary of State on February 20, 1914, "a true copy of which is hereto attached, marked Exhibit A" and made a part hereof.

IX.

That in and by the terms of said act it is provided that every miner and every loader of coal in any mine in this State who, under the terms of his employment, is to be paid for mining or loading such coal on the basis of the ton, or other weight, shall be paid for such mining or loading according to the total weight of all coal contained within his car in which the same shall be removed from out of the mine, unless the contents of such car when so removed shall contain a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by the said The Industrial Commission of Ohio.

X.

It is further provided in said act that said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt or other impurities unavoidable in the proper mining or loading of the contents of the several cars of coal in the several operating mines in said State of Ohio, and said Commission is given power to change, after investigation, any percentages ascertained or determined by it from time to time as it shall deem necessary.

XI.

It is further provided in said act that it shall be the duty of the miner or loader of coal, and his employer, to agree upon and fix for stipulated periods of time the percentage of fine coal allowable in the output of the mine wherein such miner or loader is employed, and if such agreement is not made the said Industrial Commission is authorized to fix and determine the same. Said Commission is also empowered to change from time to time the percentage of fine coal which may be so lawfully loaded. Said Industrial Commission, if it finds that for a period of one month there shall be produced a greater percentage of fine coal than that fixed and determined by it, is authorized to make and enforce such orders relative thereto as will result in reducing the percentage of such fine coal to that fixed by said Commission.

XII.

It is further provided in said act that it shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of the contents thereof over a screen or other device for the purpose of ascertaining or calculating the amount to be paid to such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished, and it is provided that any person, firm or corporation who shall violate such provision in respect thereto shall be deemed guilty of a misdemeanor, and upon conviction shall be fined for each separate offense not less than $300 nor more than $600.

XIII.

It is further provided in said act that any miner or loader of the contents of the mine car who loads a greater percent-

age of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by said Industrial Commission shall be guilty of a misdemeanor, and upon conviction shall be punished for the first offense within a period of three days by a fine of fifty cents; for a second offense within such period by a fine of one dollar; and for a third offense within such period by a fine of not less than two dollars nor more than four dollars.

XIV.

Plaintiff further shows to the court on information and belief that on or about the — day of February, 1914, and pursuant to said custom of entering into said biannual contracts, the various operators engaged in the mining of coal in the said States of Ohio, Pennsylvania, Indiana, and Illinois, by their representatives, met and conferred with the duly authorized representatives of their employees in the city of Philadelphia, Pennsylvania, with the view to making a wage agreement covering the employment of said operatives in all said four States for the period of two years, beginning with April 1, 1914; that at said meeting said operatives demanded that in the State of Ohio coal should be mined and produced, and the wages of miners and loaders be determined, in all respects in conformity with said act of the General Assembly, and in no other manner; that said meeting was adjourned without agreement; that later, on or about the — day of March, 1914, a further meeting was convened in the city of Chicago, Illinois, at which the operatives repeated the same demand with respect to the methods of mining and paying for the coal mined in the State of Ohio, but offered to renew, unmodified so far as weighing and screening of coal was concerned, the contracts expiring on April 1, 1914, in respect to the business of coal mining in the States of Pennsylvania, Illinois, and Indiana, but no offer or proposition was made to make any contract

with respect to the mining of coal in Ohio, except upon the basis of the said act of the Ohio Legislature aforesaid.

XV.

Plaintiff further shows to the court on information and belief that the operators of coal mines in the State of Ohio (among which is the plaintiff herein) were ready and willing to renew, to take effect on April 1, 1914, for the period of two years, the contract which expired on said date, and that the inability to reach such an agreement with their operatives was largely, if not wholly, due to the existence of said act aforesaid prescribing the methods of mining and determining the basis of wages of said miners and employees, and delegating to the said Industrial Commission the powers therein prescribed, and fixing and prescribing the penalties that would be incurred by said operators and said employees for any violations thereof.

XVI.

Plaintiff further shows to the court on information and belief that on April 1, 1914, the owners and operators of mines in the State of Ohio, being unable to secure men to operate their said mines upon the basis and terms upon which said mines had been operating for two years theretofore, were compelled to close down said mines, to their great detriment and damages, and that plaintiff was required for said reasons to close down its mines, to its great loss and damage.

XVII.

Plaintiff further charges that said act, to wit: said Senate Bill No. 3 is unconstitutional and void, and of no effect whatsoever, for, among other reasons, the following, to wit:

(1) It violates the Fourteenth Amendment to the Fed-

eral Constitution, in that it abridges the privileges and immunities of the plaintiff, and deprives it and other persons similarly situated of the liberty of contract, and constitutes an unwarranted and arbitrary interference with plaintiff's right to manage its business of mining, producing and selling coal according to its own judgment, and takes the property of the plaintiff and others similarly situated without due process of law.

(2) Said act confers authority and power on said Commission and requires it to determine for each operator and each miner and loader in the State, who is paid by the weight, the percentage of impurities unavoidable in proper mining or loading of coal in cars and the allowable percentage of slack or fine coal, thus depriving the said operator and his employees of the right to determine, bargain, and contract for the quality of coal to be produced from said mine, all in violation of said Fourteenth Amendment.

(3) In conferring power on said Industrial Commission to prescribe the percentage of fine coal that may be loaded and the percentage of slate, sulphur, and other impurities that may be loaded with the coal, and prescribing penalties for violations thereof by the miner or loader, said act constitutes an unwarranted interference with the rights and liberties of said miner and loader, and with his freedom of contract with his employer; and likewise, in requiring the operator to accept and pay for coal of a quality fixed by said Commission, said act interferes with the freedom of the employer to fix and determine the quality of the product of his mine and interferes with the freedom of the employer and the employee to contract with each other,—all in violation of said Fourteenth Amendment.

(4) The duties devolving on said Commission under said act, if exercised pursuant to the powers conferred on said Commission by the act creating said Commission, and especially by Sections 18, 19, 20, 21, and 22 thereof, authorize and require said Commission to investigate and in-

quire into the private business affairs of the operator, all in violation of the rights secured to said operator by the Constitution of the United States, and especially the Fourteenth Amendment thereof.

(5) The plan provided by said act of fixing the quality of said coal by said Commission, that may be lawfully mined and loaded, is wholly impracticable in the daily business operations of a mine and would result in material and arbitrary interference with the operations of the mine, in violation of said Fourteenth Amendment.

(6) Said act is not within the police power or any power of the State of Ohio. Is is not designed nor intended to promote nor protect, nor does it bear any relation to the health, safety, nor general welfare of the public. It is not intended nor designed to prevent fraud upon the operatives in coal mines. Said operatives, by section 970 of the General Code of Ohio, are specially empowered to and in fact do, by universal custom, supervise, check, and determine the weighing and weight of all coal produced.

(7) The penalties and fines prescribed in section 6 of said act, to-wit: Senate Bill No. 3, are so extreme and cumulative as to deter and prevent any person, firm, or corporation described in said act, and subject to its provisions, from challenging the validity thereof, and such persons, firms, or corporations are thereby constrained to submit to the provisions of said act rather than take the chance of the penalties imposed. The minimum fines prescribed in said section 6 of said act would amount, in plaintiff's case, to over $800,000.00 per day for each day's operation of plaintiff's property.

Said act, for the reasons herein mentioned, denies to this plaintiff and to other persons similarly situated, the equal protection of the law as secured and guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

XVIII.

Said act is likewise unconstitutional and void in that it violates section 1 of article 1 of the constitution of the State of Ohio, in prohibiting the freedom of contract therein guaranteed and secured.

XIX.

Said act is further in violation of the constitution of the State of Ohio in that it delegates legislative authority to said Industrial Commission, in violation of section 1 and section 26 of article 2 of said constitution.

XX.

Said act is further in violation of section 16, article 2, of the constitution of Ohio, which provides that no law shall embrace more than one subject, which shall be clearly expressed in its title, in that the title to said act relates exclusively to the weighing of coal at the mine, while said act purports, in the body thereof, to confer upon said Industrial Commission wide powers of inspection and supervision of the manner and methods of mining coal, and empowers said Commission to determine the quality of coal, which shall be paid for as such, and the contents of mine cars, which shall be binding upon employees and employers, regardless of their contracts in reference thereto.

XXI.

Plaintiff further shows to the court that because of said act, said Senate Bill No. 3, and the uncertainty in respect to the constitutionality thereof, plaintiff's mines are closed down as aforesaid, and plaintiff is unable to make or accept contracts which are now being offered, and particularly contracts for periods of one year or more, which contracts are

now being taken, as plaintiff is advised and believes, by the coal operators in said States of Pennsylvania and Indiana, competitors of the plaintiff, and plaintiff is now, and before the effective date of said act, suffering great and immediate and irreparable injury by reason thereof.

XXII.

Plaintiff further shows to the court that said defendants acting as said Industrial Commission, as plaintiff is informed and believes, has taken steps and measures, or is about to take steps and measures, to put said act in full force and effect, and to that end has employed its agents and a special representative, whose duties are to assist said Commission under said act, and to make the investigations in respect to the matters and things provided for therein, and plaintiff is advised and believes that said Industrial Commission, through said representative or deputy, and its employees and other agents, is about to demand access to the mines and property of plaintiff, with a view of determining and investigating, and examining into the business of mining as heretofore conducted and carried on by said plaintiff, and plaintiff is advised that said Industrial Commission threatens to and will promptly, on May 20, 1914, put into full effect all the provisions of said act, in the meantime trespassing upon plaintiff's property and the property of other operators of coal mines in Ohio, in the making of said preliminary investigations, as hereinbefore outlined; that said proposed investigations are for the purpose provided in said act, and constitute an unwarranted and illegal inquiry into the private business affairs of plaintiff.

XXIII.

That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the enforcement of said act, and from the requirements by said defendants acting as said Industrial Commission in the enforcement thereof, and to prevent a multiplicity of suits

against the plaintiff, and to prevent prosecutions under said act and the imposition of the heavy penalties described therein, and to prevent immediate and irreparable injury which will be caused to plaintiff by reason of the fact that it is prevented from operating its mines and from accepting contracts for the sale of its coal, a writ of injunction is necessary to restrain said defendants from interfering with plaintiff and other persons similarly situated.

XXIV.

That the amount in controversy herein and the value of the matters disputed herein, and the loss which the plaintiff is sustaining by the threatened enforcement of said act, and the damages to plaintiff, as hereinbefore set forth, will greatly exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs.

XXV.

Inasmuch, therefore, as plaintiff has no remedy in the premises, save in a court of equity, plaintiff prays the aid of the court;

1. To the end that the said Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, defendants herein, as members of and constituting The Industrial Commission of Ohio, may, without oath (answer on oath being expressly waived), full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged.

2. To the end that said act, Senate Bill No. 3, may be decreed to be unconstitutional and void and of no effect whatsoever.

3. To the end that plaintiff may be decreed to have the right to operate its mines and property, and to mine and sell its coal, without compliance in any way with the restrictions in said act set forth and with the regulations and orders of said Industrial Commission thereunder.

4. To the end that plaintiff, its agents and employees may be secured against unlawful and illegal trespassing and arrests, fines, and penalties by reason of any alleged violation of said act.

That the said Wallace D. Yaple, Mathew Hammond, and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, their agents, deputies, representatives, attorneys and employees of every kind whatsoever, may be perpetually and forever restrained by the order and injunction of this court from—

(*a*) Enforcing and attempting to enforce any of the provisions of said act, said Senate Bill No. 3.

(*b*) From entering upon plaintiff's premises for the purpose of making, with respect to said Senate Bill No. 3, any investigation pretended to be authorized by said act of the legislature of Ohio creating said Industrial Commission.

(*c*) Making or establishing any rules or regulations in respect to the amount of fine coal or the amount of impurities to be loaded into cars at plaintiff's mines, or to be taken as a basis for, or considered in connection with, the wages to be paid to and received by said miners and loaders of coal.

(*d*) Beginning any action of any nature whatsoever against plaintiff, its agents or employees, on account of any violation of said Senate Bill No. 3.

(*e*) Arresting or causing the arrest of any agent or employee of plaintiff.

And that said defendants, each and all of them, may be in the meantime so restrained during the pendency of this suit, and plaintiff prays for such other relief as it may in equity be entitled to.

XXVI.

May it please your honors to grant unto the plaintiff not only a writ of injunction conformable to the prayer of this bill to be issued to the above-named defendants, but also writ of subpœna to be issued out of and under the seal of this

honorable court, to be directed to said defendants, Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, commanding them, at a certain time and under a certain penalty to be therein specified, to be and appear before this honorable court, then and there to answer the premises, but not under oath (answer under oath being expressly waived) and to abide by the order and decree of the court therein, and that said defendants may appear herein according to law.

RAIL AND RIVER COAL CO.,
Plaintiff,

By A. C. DUSTIN, *Its Solicitor.*
HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys.

A. C. DUSTIN,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, Cuyahoga County, ss:

W. R. Woodford, being first duly sworn, upon his oath deposes and says that he is the president of the Rail and River Coal Company, plaintiff in the foregoing action, and duly authorized in the premises; that he has read the statements and allegations contained in said bill and knows the contents thereof and that the same are true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

W. R. WOODFORD.

Sworn to by the said W. R. Woodford and subscribed by him in my presence this 16th day of April, 1914.

[SEAL.] ADRIAN A. WYCHGEL,
Notary Public.

Exhibit "A."

(SENATE BILL No. 3.)

An Act to Regulate the Weighing of Coal at the Mines.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine: *Provided*, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the Industrial Commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this State.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust, and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed

and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force exceeds the percentage so fixed by it said industrial commission shall at once make, enter, and cause to be enforced such order or orders relative to the production of coal at such mine as will result in reducing the percentage of such fine coal to the amount so fixed by said industrial commission.

SECTION 4. Said industrial commission shall, as to all coal mines in this State which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents whereby the total weight of such contents shall be reduced or diminished. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car containing a greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: For the first offense within a period of

three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar, and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars: *Provided,* That nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt, or other impurity.

C. L. SWAIN,
Speaker of the House of Representatives.

W. A. GREENLUND,
President of the Senate.

Concurred February 5, 1914.
Approved February 17, 1914.
JAMES M. COX, *Governor.*

I hereby certify that the foregoing is a true copy of the engrossed bill.

——— ———,
Secretary of State.

Filed in the office of the Secretary of State February 20, 1914.

(Preliminary Restraining Order. Entered May 23, 1914, by Hon. John W. Warrington, U. S. Circuit Judge; Hon. J. E. Sater, U. S. District Judge, and Hon. John M. Killits, U. S. District Judge.)

No. 233. Equity.

RAIL AND RIVER COAL COMPANY

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. DUFFY, *as Members of and Constituting the Industrial Commission of Ohio.*

This cause having been argued before and submitted to the court, consisting of Hon. John W. Warrington, Circuit Judge; Hon. John E. Sater, District Judge, and Hon. John M. Killits, District Judge—such court having been constituted pursuant to section 266 of the Judicial Code—upon motion for an interlocutory injunction as prayed in the bill, and such motion, after due consideration by such court, having been denied, as appears by its *per curiam* opinion and order heretofore filed and entered in the cause, and such court having inadvertently and erroneously assumed that preliminary restraining order had been previously granted pursuant to section 266 of the Judicial Code, and so provided for suspension of its order of denial herein for a period of fifteen days to enable complainant to take an appeal to the Supreme Court of the United States if it should so desire; now it is hereby ordered that a temporary restraining order be, and such order hereby is, granted as prayed in the bill of complaint herein until the 4th day of June, 1914 (on which day said order shall expire), for the purpose of enabling complainant, if it shall so desire, to appeal the cause to the Supreme Court of the United States and there apply for an order of suspension or supersedeas in the cause.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, *Plaintiff,*
vs.
WALLACE D. YAPLE, MATHEW B. HAMMOND, *and* THOMAS J. DUFFY, *as Members of and Constituting the Industrial Commission of Ohio, Defendants.*

On Application for an Interlocutory Injunction.

Decided May 20, 1914.

Before Warrington, Circuit Judge, and Sater and Killits, District Judges.

Per Curiam:

The plaintiff, a West Virginia corporation, a large producer of coal and employer of mine laborers, of whom there are more than 45,000 in Ohio, assails the constitutionality of the Ohio law of February 5, 1914, entitled "An Act to Regulate the Weighing of Coal at the Mines," and asks for an interlocutory injunction against the defendants, who constitute the Industrial Commission of Ohio, to prevent them from enforcing and attempting to enforce any of the provisions of such act. The act, in so far as it need be considered, is set forth in the margin. Diversity of citizenship

---

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine: *Provided,* the contents of such car when so removed shall

and the presence of Federal questions confer jurisdiction. Silver *vs.* Louisville & Nashville R. R. Co., 213 U. S., 175, 191; Michigan Central R. R. Co. *vs.* Vreeland, 227 U. S., 59, 63, 64; Louisville & Nashville R. R. Co. *vs.* Siler, 186 Fed. Rep., 176, 179; Ohio River & W. Ry. Co. *vs.* Bitty, 203 Fed. Rep., 537, 589; Mutual Film Co. *vs.* Industrial Commission of Ohio, decided in this district April 2, 1914.

The Ohio Coal Commission, appointed by virtue of a joint resolution of the General Assembly (103 Ohio L., 981) "to investigate and report an equitable method of weighing coal

---

contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the Industrial Commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this State.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal, commonly known as nut, pea, dust, and slack, allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith, upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month, during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter, and cause to be enforced such order or orders relative to the production of coal at such mine as will result in reducing the percentage of such fine coal to the amount so fixed by said industrial commission.

at the mines, when the employees are to be paid for their labor on the basis of weight, measure, or quantity, and that will at the same time be to the best interest of the consumers and protect the coal measures of the State," submitted a report in December, 1913, in which, following a review of the evidence and arguments of both operators and miners, it recommended for passage a bill which finally assumed the form of the present act. The information thus brought to the attention of the General Assembly and to which counsel

---

SECTION 4. * * *

SECTION 5. Said industrial commission shall have full power from time to time to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents whereby the total weight of such contents shall be reduced or diminished. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car containing a greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: For the first offense within a period of three days he shall be fined fifty cents; for the second offense within such period of three days he shall be fined one dollar, and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars: *Provided*, That nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt, or other impurity."

in the present hearing freely alluded, in so far as deemed material, is summarized in the next succeeding paragraph and is as follows:

All mine employees are required to belong to the United Mine Workers—the strongest labor organization in the country. They have had no difficulty in the past in securing fair wages. The system of paying miners long in vogue in nearly all Ohio mines originated when only lump coal was marketable and is based on the amount of coal mined and passed over a 1¼-inch screen, which amount is assumed to be 28 per cent. The insistence of the miners that they are paid for but a part of the product of their labor began when the finer grades of coal became salable. Their persistent grievance, although it will not bear analysis, engendered disputes and bitter feeling between them and their employers. A statute (section 956, General Code of Ohio) whose purpose is the avoidance of danger, especially in gaseous mines, wisely requires the removal of fine coal and coal dust from the mines, for the violation of which (sec. 976, G. C.) the offender may be punished by fine or imprisonment, or both; but the miners, believing their grievance to be just, have not always removed such coal and dust and thereby neither obviate such danger nor conserve the coal supply. Generally stated, from 20 per cent to 50 per cent of the coal under the heretofore prevailing systems of mining has been left in pillars, ribs, and stumps. The coal so left deteriorates from exposure, becomes somewhat crushed by the overlying strata, and yields a more than ordinary percentage of fine coal, in consequence of which the miners either wholly refuse to draw such supports or decline to do so unless paid a sum additional to the regular contract price. In many instances, on account of such unwillingness, those portions of mines which yield an unusual amount of fine coal have been abandoned and the fuel so indispensable to industrial progress is lost. On account of dissimilarities in the character of coal the quantity of fine coal produced

varies in different mines and even in different portions of the same mine—the variations in some instances being quite marked. The result is a variation in the wages of miners of equal skill and ability and an advantage to operators obtaining an excess of fine coal as against the miners, and also as against other operators in districts in which an effort is made to secure as large a percentage of lump coal as is possible. The increased openings between screen bars, resulting from the wear incident to use, diminish the quantity of lump coal passing over such bars to the loss of the miner. The failure to substitute new screens is due in part to the negligence of the check weighman, authorized by statute (sec. 970, G. C.) and selected and paid by the miners to call attention to the defective character of the screens, and in part to the carelessness of the operators in failing to maintain screens conforming to their contract. Each, however, charges the other with the responsibility of such failure, and instances have occurred in which the miners have struck and closed down mines on account of disputes and delays regarding the furnishing of new screens. Neither the charge that the operators so dump mine cars as to break the coal (by an excessive drop from such cars to the screens, for instance) nor the counter-charge that the miners will not permit such dumping as will eliminate the fine from the lump coal is proved; but the cupidity and the carelessness of each are deemed factors worthy of consideration. If coal be shot from the solid, payment on the mine-run basis will result in an increased quantity of fine coal. Whether such increase will occur if the coal is undercut before it is shot down, as was done with about 95 per cent of the coal mined at the time the report was filed, is, in view of the experience in other States having kindred statutes and the difference in the Ohio coal from that of other fields, problematical. If an increase occurs, it will operate quite prejudicially to the sale of Ohio coal. The adoption of the mine-run system will also cause, to the prejudice of the operators, a considerable increase in

the amount of impurities brought to the surface, unless some way be found to protect the operator from the carelessness and indifference of the miner, and will require the inauguration of some method of cleaning. It will also necessitate some increased expenditure in the readjustment of tipples. The commission, in view of its findings so summarized as above, concluded that the present system of mining is inequitable, unjust, and productive of discontent. To obviate existing conditions and to conserve the coal by supplying an incentive to employees to remove pillars, ribs, and stumps and the portion of mines yielding more fine coal than is usual and to load and send from the mine the fine coal which is now left underground, the commission recommended that shooting from the solid be prohibited and that the mine-run system of payment be adopted, but so safeguarded as to apply to clean coal only, *i. e.*, coal so cleaned as to be marketable.

The plaintiff charges that the act, in lodging in the Industrial Commission the duty of determining the percentage of impurities unavoidable in the proper mining or loading of coal, and of fixing, in case of disagreement between the mine operator and his employees and until they subsequently agree, the percentage of fine coal allowable in the output of the mine, unreasonably, unnecessarily, and arbitrarily deprives the operator, whose business, it is alleged, is strictly private and unaffected by any public interest, from contracting with his employees for the production of coal containing more impurities or having a greater degree of purity than that which the commission has fixed, and denies him the right to reject and requires him to accept and to make payment for the total contents of each mine car, without deduction or diminution, so long as the percentage of impurities fixed by the commission is not exceeded. It avers that the act is not designed to protect the morals, health, or safety of the public or of mine employees and has no real or substantial relation as between the purposes attributed to it and the means devised for attaining such purposes, but has for

its object the regulation of the relations between masters and such of their servants as are paid by weight for coal mined or loaded; and that it is therefore unconstitutional in that it deprives the plaintiff of liberty and property without due process of law and of the equal protection of the law as guaranteed by the Fourteenth Amendment and the Ohio bill of rights.

The act must be sustained, unless it can be clearly shown to be in conflict with some constitutional provision (Board of Health *vs.* Greenville, 86 Ohio St., 1, 20; Schmidinger *vs.* Chicago, 226 U. S., 578, 587, 588; Mutual Film Co. *vs.* Industrial Commission of Ohio, *supra*). It came into existence through a claimed exercise of the police power, a power which extends to the making of regulations "promotive of domestic order, morals, health, and safety" (Railroad Co. *vs.* Husen, 95 U. S., 465, 471). Laws enacted in its appropriate exercise have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (Camfield *vs.* U. S., 167 U. S., 518, 524), to promote harmonious relations between capital and labor (McLean *vs.* U. S., 211 U. S., 539, 549, 550), to avert strikes, violence and bloodshed (Peel Splint Coal Co. *vs.* West Virginia, 36 W. Va., 802; Knoxville Iron Co. *vs.* Harbison, 183 U. S., 13, 21), to provide for the safety and health of miners (Freund, Police Power, sec. 115; Plymouth Coal Co. *vs.* Pennsylvania, 232 U. S., 531), and to regulate mines and mining and to conserve and avoid the waste of fuel, minerals, and other natural resources (Barrett *vs.* Indiana, 229 U. S., 26, 29; State *vs.* Ohio Oil Co., 150 Ind., 21; Ohio Oil Co. *vs.* Indiana, 177 U. S., 190; Hudson Water Co. *vs.* McCarter, 209 U. S., 349; Wilmington Star Mining Co. *vs.* Fulton, 205 U. S., 60).

The rule announced in McLean *vs.* Arkansas, *supra*, which involved a statute akin to that here under consideration, has subsequently been so often approved by the Supreme Court as to be controlling in the present instance, if

the Ohio act is not materially different from that of Arkansas and is free from the constitutional infirmities which resulted in the overthrow of the earliest statute for the weighing of coal before screening (93 Ohio L., 33; *In re* Preston, 63 Ohio St., 428). It is contended that the McLean case is not an authority on account (among other things) of the powers conferred on the Industrial Commission, the alleged absence of a provision granting to operators the right, under proper circumstances, to reject coal brought to the surface, the possibly heavy penalties that may be imposed on offending operators, and the alleged obscurity and uncertainty of the penalties to which transgressing employees will be subjected and that the act must be held to be in excess of the State's police power and contrary to its declared policy in view of the Preston case, which pronounced invalid a law less vulnerable, it is claimed, to constitutional objection. None of the State courts has passed upon the present statute. The courts may declare the public policy when the law-making power is silent, but when the people, acting within constitutional powers, have, by amendment to their fundamental law enumerated the subjects of legislative action, such constitutional provision and statutes enacted in harmony therewith must be enforced and not nullified by the courts (Probasco *vs.* Raine, 50 Ohio St., 378, 391). Subsequent to the decision of the Preston case, the State constitution was amended by adding to article 2 the following sections:

> "SECTION 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.
>
> "SECTION 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Without determining the soundness of the argument that the act, indirectly at least, establishes a minimum wage, in that it insures the miner full pay for all coal mined in accordance with the prescribed regulation, it may not be said that, in supplying an incentive for more effectually securing the removal of fine coal and coal dust to the surface and thereby minimizing or dissipating the danger arising from their continued presence in the mines, the act does not provide for the health, safety and general welfare of employees. Furthermore, section 36 was designed to limit by appropriate legislation the freedom of contract as regards the methods of mining, weighing and measuring coal. We are not prepared to hold that the legislature, acting within the scope of that section, may not say that the business of mining coal is so far affected with a public interest as to justify appropriate regulation of the manner of paying employees when they are to be paid according to the quantity produced and when such regulatory statute will operate to allay discord and strife and conserve the coal supply.

The Ohio act does not restrict the right of contracting for the labor of miners by the day, week, month or year, or in any other manner (except as to quantity) that the operator may deem proper. If the miner or loader by the terms of his employment is to be paid by the ton or other weight, the right of contract is then curtailed to the extent that he shall be paid according to the total weight of the coal contained in the mine car, such contents to include, however, no greater percentage of slate, sulphur, rock, dirt or other impurities than is unavoidable, as determined by the Industrial Commission. If the employé should send to the surface an excess of such impurities, or of any of them, the operator is not required to accept the car or pay for its contents as delivered, but is at liberty to agree with him as to the deductions to be made on account of impurities. If no agreement is made the offending employé may be prosecuted for his violation of the commissioners' order as for a misdemeanor. If he be

unable or unwilling to pay the fine imposed he may be imprisoned in the county jail until his fine and costs are paid or secured to be paid or he is otherwise legally discharged, provided that he be given credit upon his fine and costs at the rate of sixty cents per day for each day's imprisonment (sec. 13,717, G. C.). He is thus subjected to penalties which are neither obscure nor uncertain. The act does not require the operator to mingle the contents of such a car with the other coal produced or prevent his removing, by screening or otherwise, the excess of any impurities. It must be presumed that the Industrial Commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt, or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the commissioners' order, which by statute is made *prima facie* reasonable and lawful, he may petition for and obtain a hearing before the commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the State (act February 27, 1913, 103 Ohio L., 95, sections 25, 27, 38, 42; art. 4, sec. 2, Ohio Constitution). The commission may of its own motion upon investigation modify or rescind any of its prior orders. The law permits the employer and employé to stipulate as between themselves what percentage of coal commonly known as nut, pea, dust and slack shall be allowable in the output of the employer's mine. It is only in case of their disagreement that the commission may designate such percentage, and its orders in that behalf must possess the same characteristics as those above mentioned and are likewise subject to rehearing and review. If at any time for a period of one month during the operation of the mine the percentage so fixed is exceeded, the commission is required to enforce its order regardless of whom the offender may be. The act prescribes no penalty for disobedience to such an order, but if, as claimed by defendants, section 43 of the act of February 27, 1913, applies,

which we do not determine, an offending party may be fined not less than $50 nor more than $1,000 for his first offense and not less than $100 nor more than $5,000 for each subsequent offense. In either event the attitude of the employer is no worse than that of the employé. The danger of an increase in the quantity of fine coal caused by shooting from the solid may, under the act of February 5, 1914 (104 Ohio L., 161), be wholly obviated, if the operator so elects, in that shooting of that character may not be done and is made a misdemeanor, unless the operator and a majority of his miners obtain from the commission, upon application, an order permitting it.

A violation of the provisions of section 6 is made a misdemeanor punishable by fine for each distinct offense in a sum not less than $300 nor more than $600. If the penalties are a separate part of the act, which we need not now determine, the objection to it on account of them is premature (Flint *vs.* Stone Tracy Co., 220 U. S., 177). If they are not thus separate they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer, wishing to test the law, will risk the possibilities of repeated violations of the commissioners' orders.

Every argument advanced to sustain the contention that the act delegates legislative power to the Industrial Commission in violation of section 1, article 2, of the State constitution was urged against the act providing a board of censor of motion picture films, approved May 13, 1913, in the case brought by the Mutual Film Co. *vs.* The Industrial Commission of Ohio, *supra.* To state our reasons for holding the present contention unsound, as we do, would be to repeat in substance what was said to the same point in that case. We are content to abide by the conclusion there reached.

The claim that the act is in violation of section 16 of article 2 of the Ohio constitution, which provides that "no

bill shall contain more than one subject, which shall be clearly expressed in the title," is unavailing. But one subject is embraced in the act. Were it otherwise, we should follow the decisions of the State court and hold that the provisions of the constitution above quoted is directory and not mandatory (Ohio *ex Rel. vs.* Covington, 29 Ohio St., 102, 116).

In view of the above-quoted amendments to the Ohio constitution, the present act's want of similarity to that considered in the Preston case, and its general resemblance in its principal features to that of Arkansas, the instant case is ruled by McLean *vs.* Arkansas and is well within German Alliance Insurance Co. *vs.* Lewis, decided April 20, 1914, Sup. Ct. U. S. It is not repugnant to any constitutional provision, State or Federal. The prayer for an interlocutory injunction is therefore denied. In order, however, to enable complainant to take an appeal in each of the suits directly to the Supreme Court of the United States, pursuant to section 266 of the Judicial Code, and to apply to that court for orders of suspension or supersedeas, if it so desire, we have concluded to suspend the operation of the orders of denial herein for a period of fifteen days from the date of their entry.

J. W. WARRINGTON,
Circuit Judge.

J. E. SATER,
District Judge.

JOHN M. KILLITS,
District Judge.

IN THE SUPREME COURT OF THE UNITED STATES.

RAIL AND RIVER COAL COMPANY, *Appellant,*

vs.

WALLACE P. YAPLE *et al., Appellees.*

Stipulation for Printing Record on Application for Restraining Order.

It is agreed by counsel for all parties that the following papers may be printed as a record by stipulation for use on application for restraining order in this court:

1. Application in United States Supreme Court for restraining order.
2. Affidavit of C. E. Maurer.
   Affidavit of D. J. Jordan.
   Affidavit of W. R. Woodford.
   Affidavit of John M. Roan.
3. Appellant's bill, including Exhibit A thereto attached, which is a copy of the run-of-mine coal law of the General Assembly of Ohio, passed February 5, 1914.
4. Order entered by the three judges.
5. Opinion of the three judges.

It is agreed that the foregoing is sufficient to show the merits of the question presented by the motion for restraining order.

It is further agreed that the said motion is to be called up for submission to the court on June 8, 1914, without further notice to counsel.

A. C. DUSTIN,
Counsel for Appellant.
TIMOTHY S. HOGAN,
Attorney General of Ohio.
C. D. LAYLIN,
ROB'T M. MORGAN,
Counsel for Appellees.

[25644]

513

No. ~~1104~~.

IN THE

SUPREME COURT OF THE UNITED STATES.

RAIL & RIVER COAL COMPANY, PLAINTIFF,

vs.

WALLACE D. YAPLE ET AL., DEFENDANTS.

BRIEF ON MOTION FOR A RESTRAINING ORDER.

A. C. DUSTIN,
HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Plaintiff.

A. C. DUSTIN,
Of Counsel.

CONTENTS.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES

RAIL & RIVER COAL COMPANY, PLAINTIFF,

vs.

WALLACE D. YAPLE ET AL., DEFENDANTS.

BRIEF ON APPLICATION FOR A RESTRAINING ORDER.

This is an appeal from an order of the District Court of the United States for the Northern District of Ohio denying an application for an interlocutory injunction under section 266 of the Judiciary Act of March 3, 1911. No application was made in the court below for a restraining order. When the court below denied the application for an interlocutory injunction it granted a restraining order to remain in effect until June 4, 1914, so as to preserve the *status quo* until the plaintiff could present its application to this court for a restraining order. The plaintiff has perfected the appeal, and now submits a motion for a restraining order as prayed in the bill, to remain effective until this appeal can be heard upon the merits.

That this court has power to grant a temporary restraining order in order to preserve the *status quo* pending the determination of the appeal appears sufficiently from Omaha & C. B. St. Ry. Co. *vs.* Interstate Commerce Commission, 222 U. S., 582, and the cases there cited. The court there

refers to section 716 of the Revised Statutes as the source of the court's power. That section is continued in section 262 of the Judiciary Code, which is in part as follows:

> "The Supreme Court, the Circuit Courts of Appeal, and the district courts, shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In Journal of Commerce, etc., Bulletin *vs.* Burleson, 229 U. S., 600, the Supreme Court granted a restraining order against the Postmaster General pending the appeal enjoining the enforcement of a certain statute, the constitutionality of which was involved in that case.

The Judiciary Code also provides that a single justice may grant a writ of injunction in cases where the whole court is empowered to do so. Section 264 is in part as follows:

> "Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court."

This application on June 4 was presented to Justice Day, at whose suggestion the motion is presented to the full bench.

The affidavits filed with this application show that the methods of paying miners and loaders of coal on the screen-coal basis have always prevailed in Ohio, and that irreparable loss will result if the *status quo* is not maintained until this case can be heard on its merits.

The loss to the plaintiff and the other operators in Ohio in being required to conform to the law, as shown in these affidavits, may be summarized thus:

1. The present system of paying miners and loaders of coal in Ohio by weight on the screen-coal basis is the growth of years of experience based upon competitive conditions

with Pennsylvania, Indiana, West Virginia, and Illinois from a market standpoint, and has formed the basis of wage agreements in Ohio for many years; that such system was arrived at after careful consideration by both miners and operators, and was adopted by mutual consent, and that any interference or disturbance of such wage arrangement in Ohio, without a corresponding change in the competitive States, will restrict and destroy the markets for Ohio coal.

2. That the present law of Ohio would compel every operator to practically rebuild and rearrange his tipples at the mines, at a very large cost and expense.

3. That the inevitable result of a mine-run system of paying the miners and loaders is to increase the per cent of slack coal, and to the extent that fine or slack coal is increased by any mining methods which may be adopted is the operator's chances for profit reduced. The loss from this source is very great.

4. That the Ohio coal meets the competition of the coal produced in the other States mentioned, and any system that will increase the cost of the Ohio coal without a corresponding increase in other States will drive the Ohio coal out of the competitive markets, and that the United Mine Workers and the coal operators in the competitive States of Pennsylvania, Illinois, and Indiana have renewed for two years the wage agreements which expired on April 1, 1914.

5. In allowing the Industrial Commission to fix and publicly announce the percentage of dirt, slate, and other impurities that may be lawfully mined, the coal produced in Ohio is placed under a handicap in all competitive markets.

Neither the defendants nor the State of Ohio will suffer any pecuniary loss by the granting of this restraining order.

The miners and loaders of coal in Ohio can suffer no loss unless their earnings under the new system of payment can be increased. The narrow margin of profit shown by the affidavits makes it self-evident that any increase in the cost of coal in Ohio cannot be made and the operators in Ohio remain in business *unless there is a corresponding increase in the cost of coal in the competitive States.* The cost of coal in such competitive States remains the same as before under the new wage agreements which took effect April 1, 1914.

We, therefore, have a case where great and irreparable injury will result to the plaintiff and the other coal operators in Ohio unless the effective date of this law shall be stayed by the court until its constitutionality may be fully determined, and where no apparent injury will be done to anybody else by the granting of such restraining order.

The relief sought by the bill in this case is an injunction against the defendants as members of and constituting the Industrial Commission of Ohio, to prevent their enforcement of or the taking of any steps to enforce the act of the General Assembly of Ohio entitled "An Act to Regulate the Weighing of Coal at the Mines." A copy of the act is attached as Exhibit A to the bill.

By the terms of this act (section 2) it is provided that the Industrial Commission of Ohio "shall ascertain and determine" for the coal mines within the State of Ohio

> "the percentage of slate, sulphur, rock, dirt or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal."

Section 3 of the act makes it the duty of the miner or loader of coal and his employer to agree upon and fix for stipulated periods the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine where such miner or loader is employed, and in the event there shall not be any such an agreement.

> "said Industrial Commission shall forthwith, upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed * * * shall continue in force until otherwise agreed and fixed by such miner or loader and his employer."

The Industrial Commission is empowered by this section, whenever the output of fine coal for any mine exceeds for a period of one month the percentage fixed by the Commission, to make and enforce such orders relative to the production of coal at that mine as will result in reducing the percentage of such fine coal to that fixed by the Commission.

By sections 4 and 5, the powers of the Commission are extended over mines that may thereafter be opened up, and it is given full power to change upon investigation any percentage previously fixed by it.

Sections 1 and 6 require that the miner or loader shall be paid according to the total contents of the mine car, without reduction or diminution, provided the contents of such car

> "shall contain no greater percentage of slate, sulphur, rock, dirt or other impurity than that ascertained by the Industrial Commission of Ohio."

Violations of section 6 are made a misdemeanor punishable by a fine of not less than $300 nor more than $600 for each car. What shall be done with the contents of the car in event it does exceed in impurities the percentage so specified, is not covered by the act.

Section 7 of the act makes the mining or loading of a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by the Industrial Commission a misdemeanor punishable by certain fines.

It will be noted that the act regulates the business of coal mining in Ohio in several respects:

1. It provides for the payment of wages of miners or loaders according to the total weight of the contents of the

cars in which the coal is loaded, without any diminution therefrom by any device unless the contents of the car exceed in impurities the percentage fixed by the Commission.

2. It authorizes the Industrial Commission of Ohio to fix the percentage of impurities which the miner or loader may place in his coal car.

3. It authorizes the Industrial Commission, in the event the miner or loader and the employer have not agreed thereon, at the request of either to fix the percentage of fine coal which the miner or loader may place in his coal car, and prescribe rules to enforce obedience.

4. Disobedience of the law by the operator in failing to weigh and pay for the coal as prescribed, and disobedience by the miner or loader in exceeding the amount of impurities prescribed by the Industrial Commission, are made misdemeanors punishable as hereinbefore set forth.

There is no provision in the act which gives to the owner of a mine the right to reject coal sent to the surface by the miners and loaders so long as it possesses that degree of freedom from fine coal and impurities which the Commission has fixed; nor is there any clause which gives the mine owner and the miner the right to contract between themselves for the production of coal of a degree of purity greater than that which the Commission has fixed.

The law in effect, therefore, requires the owner of all mines to accept and pay for whatever substance their employees may send to the surface, which the Commission sees fit to denominate "coal," no matter whether such substance is suitable for his needs or the requirements of the market or not. If the mine owner desires a fine quality of coal, free from impurities—*e. g.*, for such purposes as blacksmithing—he is deprived of the power of contracting with his em-

ployees for its production unless the Commission has seen fit to fix an extremely high standard of purity. On the other hand, if the mine owner is content with a coal of less purity than that fixed by the Commission, the law forbids the mine owner to produce it.

As to the amount of slack or fine coal which shall be contained in the product—if the miner and producer are unable to agree between themselves, the State again steps in and determines, through the Commission, what amount of lump and what amount of slack coal the parties must mine and accept, without regard to their respective wishes or needs.

We contend that the act in question violates both the constitution of Ohio and the Federal Constitution, because—

(1.) It interferes with the liberty of contract on the part of the operator and the miner or loader of coal.

(2.) It interferes in an arbitrary and unwarranted manner with the business of the coal operator, by delegating to the State Industrial Commission the power to regulate the business of such operator by prescribing the quality of the product of his business.

(3.) It prescribes penalties for violation of section 6 of the act so terrifying in their cumulative severity as to deny to the operator the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(4.) The offenses of the miners or loaders of coal for which penalties are prescribed in section 7 are too obscure and uncertain in their operation to be enforced.

(5.) It delegates legislative authority to said Industrial Commission, contrary to section 1 and section 26 of article 2 of the constitution of Ohio.

Excessive Penalties.

The minimum penalties prescribed in this act (section 6) for violation by the coal operator would amount in plaintiff's case to over $800,000 for a single day's operation in violation of the law. Such penalties render the whole act unconstitutional (*ex parte* Young, 209 U. S., 123), unless they are separable from the rest of the act, in which event the penalties alone become unconstitutional and void, not affecting the validity of the rest of the act (Wilcox *vs.* Gas Co., 212 U. S., 19, 53-54; Railroad Co. *vs.* Garrett, 231 U. S., 298; Railway Co. *vs.* Commission, 231 U. S., 457, 458).

The rule laid down in Wilcox *vs.* Gas Co. (212 U. S., 54) for determining this question, is as follows:

> "When the objectionable part of the statute is eliminated, if the balance is valid and capable of being carried .out, and if the court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good (Regan *vs.* Trust Co., 154 U. S., 362, 395; Berea College *vs.* Commonwealth of Kentucky, 211 U. S., 45, 54). This is a familiar principle."

The statute is distinctly penal and, unlike the Wilcox and kindred cases, has no means of enforcement, except the penalties therein provided. The penalties are therefore not separable.

Garden *vs.* State, 46 O. S., 607, 632.
State *vs.* Messenger, 63 O. S., 398, 401-2.

THE LAW AS A WHOLE VIOLATES THE CONSTITUTION OF THE UNITED STATES, IRRESPECTIVE OF THE PENALTY PROVISION.

That the right to choose one's calling, and the right to labor and follow any lawful business, and make any lawful contract in respect thereto are property within the protection of the 14th Amendment to the Constitution of the United States cannot be denied.

Slaughter-house Cases, 16 Wall., 37, 116, 122.
Allgeyer *vs.* Louisiana, 165 U. S., 578.
Adair *vs.* United States, 208 U. S., 161, 172.

The right to regulate the business of railroads arises from their being public highways (Wisconsin *vs.* Jacobson, 179 U. S., 287, 296). Other kinds of business may be regulated when affected with a public interest (Munn *vs.* Illinois, 94 U. S., 113), under which class would come grain elevators, hotels, public docks, etc.

The business of coal mining, however, is strictly a private business, unaffected by any public interest. The owner of 100 acres of coal land sustains the same relation to the State as the owner of 100 acres of timber land or agricultural lands. The constitutionality of the act in question, therefore, must rest upon the right of the State to enact this legislation under what we know as the police power.

The law does not relate to nor is it concerned with the morals, health or safety of the public, or of the employees in mines; it does not relate to nor is it concerned with the sale of coal by the producer to the public. Its purpose is to regulate the relations of master and servant in the business of coal mining.

That the legislature may, under the police power, interfere to some extent with the power and freedom of contract is not denied.

Laws regulating the relations between dealers in goods and the consuming public intrench upon the freedom of contract, but have been sustained where they affect the health or are designed to prevent fraud upon the public.

Dairy Co. *vs.* Ohio, 183 U. S., 238.
Arbuckle *vs.* Blackburn, 191 U. S., 405.
People *vs.* Van De Carr, 199 U. S., 552.
Storage Co. *vs.* Chicago, 211 U. S., 306.
Minnesota *vs.* Barber, 136 U. S., 313.
Schmidinger *vs.* Chicago, 226 U. S., 578.
Mugler *vs.* Kansas, 123 U. S., 623.

Legislation affecting the relations of master and servant limiting the right of contract has been sustained in a variety of cases, and it will not be unprofitable to refer to some of them, and the reasons assigned for sustaining the constitutionality of such laws.

Holden *vs.* Hardy, 169 U. S., 366, 395 (Health).
Muller *vs.* Oregon, 208 U. S., 412 (Health).
Railroad Co. *vs.* Arkansas, 209 U. S., 453, 571 (Safety).
Railroad Co. *vs.* Commerce Commission, 221 U. S., 612, 619 (Safety).
Mining Co. *vs.* Fulton, 205 U. S., 60 (Safety).

Such laws to be sustained must bear some real, substantial and necessary relation to the object to be attained. The courts will determine the purpose of the law from its natural and reasonable effect. Thus. in Minnesota *vs.* Barber, 136 U. S., 313, 319, a case involving an act of the State of Minnesota with respect to the inspection of cattle before slaughter, Justice Harlan, speaking for the Supreme Court, said:

> "* * * In whatever language the statute may be framed its purpose must be determined by its natural and reasonable effect."

And on page 320 Justice Harlan, after quoting with approval from Mugler *vs.* Kansas, 123 U. S., 623, 661, says:

> "Upon the authority of those cases and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

The object to be attained must be a lawful one and within the police power of the State before the State may interfere to annul contracts of parties *sui juris*.

In Adair *vs.* U. S., 208 U. S., 161, 173, a case involving an act of Congress prohibiting the discharge of employees by carriers engaged in interstate business on account of membership in labor organizations, Justice Harlan, who had delivered a dissenting opinion in Lochner *vs.* New York, 198 U. S., 45, quoted with approval from the majority opinion in that case as follows:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer *vs.* Louisiana, 165 U. S, 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the ex-

> ercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler *vs.* Kansas, 123 U. S., 623; *In re* Kemmler, 136 U. S., 436; Crowley *vs.* Christensen, 137 U. S., 86; *In re* Converse, 137 U. S., 624. * * * In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: **Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.**"

And Justice Harlan then added:

> "Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation."

Justice Harlan further said (page 172):

> "It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him."

In Lochner *vs.* New York, 198 U. S., 45, 54, Mr. Justice Peckham, speaking for the Supreme Court, said:

> "Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of liveli-

> hood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State."

In the Lochner case, Justice McKenna reviews many of the cases affecting the relations of master and servant and restricting the right of contract, to which review we respectfully refer the court. It is to be noticed in passing that while there was a strong dissenting opinion written by Justice Harlan in the Lochner case, an examination of the dissenting opinion, as well as the majority opinions rendered by the Court of Appeals of New York (176 N. Y., 145) shows that the differences were largely if not wholly caused by the different views the judges took of the occupation in question—whether it was healthful or unhealthful and therefore subject to regulation as to hours of employment. In reference to this difference of view Justice Harlan says in the Adair case (208 U. S., 174):

> "The minority were of opinion that the business referred to in the New York statute was such as to require regulation."

In the Lochner case Justice Peckham further said, on page 64:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. **The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether**

> **it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.** * * * (Citing cases.) The court looks beyond the mere letter of the law in such cases. * * * (Citing cases.)"

We have heretofore commented on the fact that the statute here in question is not concerned with nor does it relate to the morals, the health, or the safety of anybody. It has, for *one of its purposes*, the weighing or measuring of the product of the employee's labor for the purpose of determining the amount of wages to be paid to him. If this were its *sole* purpose and the means provided were adequate it might be sustained.

Laws limiting or restricting the power of contract between employer and employee have been sustained as constitutional upon the theory that the two parties (employer and employee) were not on an equal footing. Such laws prevent oppression by the employer. In Holden *vs.* Hardy, 169 U. S., 366, 397, it was said:

> "The fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality."

Knoxville Iron Company *vs.* Harbison, 183 U. S., 13, which involved the construction of a state statute requiring the redemption of store or coal orders, was decided upon similar grounds.

The contrary doctrine was announced in Frorer *vs.* People, 141 Ill., 171; Missouri *vs.* Loomis, 115 Mo., 789.

Laws limiting the right of sailors to make contracts in respect to the payment of their wages have been sustained for reasons similar to those assigned in Holden *vs.* Hardy.

Patterson *vs.* Bark Eudora, 190 U. S., 169.

Robertson *vs.* Baldwin, 165 U. S., 275.

In State *vs.* Railroad Co., 242 Mo., 339, the Supreme Court of Missouri held a law requiring payment of wages to be made twice a month constitutional, but stated that the law reached the very "verge of the police power."

In Braceville Coal Co. *vs.* People, 147 Ill., 66, an act requiring payment of wages weekly was held unconstitutional.

Freund on Police Power, section 321, says:

> "If we do recognize the legitimacy of the exercise of the police power for the prevention of oppression, this legislation, especially store order acts, sanctioned by the practice of most civilized countries, is within the province of governmental power. * * * The prompt payment of wages in lawful money is a reasonable incident to the contract of employment."

McLean *vs.* State, 81 Arkansas, 304, involved the validity of a statute of the State of Arkansas requiring coal to be weighed before it was screened where the wages of the employee were payable by the ton weight The court held the law to be within the police powers of the State on the ground that it was designed to prevent fraud upon the employee in measuring the product of his labor upon which his wages depended. The court said:

> "* * * The operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miner. The coal 'shall be accepted or rejected,' but 'if accepted' then it 'shall be weighed in accordance with the provisions of the act.'
>
> "The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded."

The court cited in support of this decision Freund on Police Power, sections 272 to 275.

The claim made by the Attorney General of Arkansas in his brief was that the object of the act was to see that the miner was honestly paid for his labor, and to prevent fraud in the measurement of the coal mined.

This judgment was affirmed in 211 U. S., 539. Justice Day, at page 550, after quoting at considerable length from the report of the commission of Congress on the subject of coal mining, said:

> "We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactment of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues, and the promotion of the harmonious relations of capital and labor engaged in a great industry of the State.
>
> "Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts."

It may be noted in passing that the policy of the State of Arkansas, as declared by the Supreme Court, is directly opposed to the policy of the State of Ohio as declared by its Supreme Court, where a law similar to that of the State of Arkansas was held unconstitutional, as will be hereafter shown.

On the relation which the statute should have to the purpose to be accomplished, perhaps no better statement can be found than that of Justice Harlan in Adair *vs.* United States, 208 U. S., 161, 174, heretofore quoted, but we desire, also, to call the court's attention to the language of Mr. Justice Peckham in Welch *vs.* Swasey, 214 U. S., 91, 105, where he says:

> "The statutes * * * must have some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently

decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, if the statutes are *arbitrary and unreasonable,* and *beyond the necessities of the case,* the courts will declare their invalidity. The following are a few of the many cases upon this subject: Mugler *vs.* Kansas, 123 U. S., 623, 661; Minnesota *vs.* Barber, 136 U. S., 313, 320; Jacobson *vs.* Massachusetts, 197 U. S., 11, 28; Lochner *vs.* New York, 198 U. S., 45, 57; Chicago Railway Company *vs.* Illinois, 200 U. S., 561, 593."

If the statute in our case concerned itself *solely with the method of weighing the coal to determine the amount* upon which the wages of the employee depended, leaving employer and employee free to contract for *the rate of wages* and free to contract with *respect to quality of the product* which the employer desired, the facts would be like those in McLean *vs.* Arkansas, *supra,* but there is a wide difference between that case and the case at bar. The statute of Arkansas left the operator free to contract with respect to the quality of his coal. It expressly permitted the employer to reject the contents of any car of coal which did not measure up to his requirements. It was evidently in large measure by reason of the fact that this power of rejection was left in the operator that the Supreme Court upheld the Arkansas statute. The statute in our case deprives the operator of this power, and delegates to the Industrial Commission the power to determine for him the quality of the product that he must accept. Therefore the legislature of Ohio, in passing this act, ostensibly to regulate "the weighing of coal at the mines" in the interest of the employees, has invaded the rights of the employer in several respects not within the Arkansas statute. Under our law the Industrial Commission is authorized to "fix" the percentage of "slate, sulphur, rock, dirt, and other impurity" which may lawfully be loaded into and become a part of the contents of the "mine cars," and which,

when so "fixed," the operator must accept and pay for under the provisions of section 1 and section 6 of the statute, whether he wants it or not, and without regard to his market requirements. The Industrial Commission, likewise, is empowered, under the provisions of section 3, in the event an employee and his employer shall not agree upon the percentage of fine coal, to "fix" the allowable percentage of fine coal which the operator must accept and pay for. **In other words, the right of the operator to determine the quality of the product that he wishes, having due regard to his market necessities, is taken away from him and delegated to the Industrial Commission of Ohio. This is clearly an arbitrary, unwarranted and unnecessary interference by the State with the right of the coal operator to manage his own business according to his own ideas.** It belongs to that class of legislation, but goes farther than any statutes to which our attention has been called, in interfering with the right of contract. *It is paternalism carried to the extreme. It is introducing government by commission with a vengeance.*

Suppose the Commission in its wisdom fixes a standard permitting impurities to such degree and of such nature that the coal which is mined is unsalable. The operator would be forced to pay for a product which he cannot use, which he does not want, which he would not have contracted for, and which he cannot sell. The act permits this very thing.

It is well in this connection and in the subsequent discussion to bear in mind that the constitutionality of the statute is to be tested by its possibilities, as stated in Eubank *vs.* Richmond, 226 U. S., 137, 144; or, in other words, that the constitutionality of a statute depends upon what may under its terms be lawfully done. St. Germain Irrigating Company *vs.* Hawthorne Ditch Co., 143 N. W., 124, 127; Sterritt *vs.* Young, 14 Wyo., 146; 116 Am. St. Rep., 994.

In determining the standard of impurities unavoidable under "proper mining" of coal, the Commission thrusts its own views of what constitutes proper mining upon the operator. If the operator desires to conduct his business in a

manner which may seem improper to the Commission, and to contract with his employees for more or less impurities than the Commission thinks unavoidable in proper mining he is not at liberty to do so. And this power is given to the Commission as a means to the ultimate end of protecting the employee from the fraud and oppression of his employer!

What substantial relation is there, we ask, between the end desired and the means employed? What warrant is there for thus interfering with the liberty of contract of the operator in order to promote the general welfare of the operatives?

Furthermore, the statute interferes with the liberty of contract in providing that, if the operator and operative cannot agree in fixing the allowable percentage of fine coal to be mined, the Industrial Commission shall, upon the request of the miner or his employer "fix such allowable percentage of fine coal."

It is no answer to the statement that this is an interference with the liberty of contract between the operator and operative, to say that the Commission fixed the percentage only in the event of disagreement. It is sufficient to point out that if any operations are carried on under the percentage fixed by the Commission, such operations are not pursuant to a meeting of the minds of the employer and employee, but are pursuant to terms fixed by third parties who do not represent either the employer or employee.

The statute does not state upon what basis the Commission is to fix the allowable percentage of fine coal, and the Commission will be influenced by its own ideas of how mining should be conducted. How solicitous the Commission might be of the rights of the operator to make his enterprise profitable is immaterial. It is sufficient that the conduct of the operator's business is conferred to the discretion of parties not responsible to him.

The effect, therefore, of these provisions is to delegate to the Industrial Commission the power to fix the *quality of*

the product which the operator shall take and pay for out of his own mine. We respectfully submit that this is an arbitrary and unwarranted interference with his liberty of contract and to conduct his business in a manner as seems best to him, and that there is no real and substantial relation between this deprivation of liberty of contract and the prevention of fraud and oppression upon the employees. In no other case that we are aware of has any legislature attempted to regulate the quality of the product in which any business man may deal under the pretense that it was necessary to protect the employee from fraud or oppression. That there is no real and substantial relation between the object in view and the means employed we think is clearly indicated by the facts, and also by the fact that other States have not found it necessary to adopt such harsh provisions in order to protect the operative, and that the typical form of mine-run law is that which was upheld in McLean *vs.* Arkansas, *supra.*

The important purpose of the provisions to which we object was no doubt to protect the operator himself, but this is immaterial, for in order to protect him, the legislature is not authorized to regulate the quality of his product.

Suppose the legislature should, in order to prevent fraud or theft on the part of street-car conductors, provide for Government operation of the street railways, paying certain royalties to the owners —such a law would clearly be without the bounds of the police power. The court would, in that case, say, as it did in People *vs.* Lochner, 198 U. S., 45, and People *vs.* Williams, 189 N. Y., 131, that there was no real and substantial relation between the end in view and the means employed, and that the statute was unduly oppressive, unreasonable, and arbitrary. And yet the effect of the mine-run law is substantially that of the hypothetical case. Furthermore, if the legislature can regulate the quality of the product which the operator must mine, we ask to what extent does the legislative power go? It will be but a short step to Government supervision over all the details of the coal-

mining business, and to fixing by the Government of all the terms of the contract between the employer and employee.

The operator has as clear a right to mine as much or as little fine coal and as much or as little of impurities as the owner of a department store has to choose the goods in which he proposes to deal. If it should be found that owners of department stores defrauded their employees in the sale of certain articles, it would not be competent for the legislature to delegate to a Commission the power to eliminate such products from those in which the owner might deal. Yet, if the mine-run law is sustained, laws of the character supposed would also have to be sustained. We would then have the regulation of all private business by Government-appointed commissions, all acting under the assumption that the prevention of fraud on the employees necessitated such novel methods. Certainly, it is common knowledge that the prevention of fraud does not require such extreme measures. We, therefore, submit that the mine-run law does not conform to the tests laid down in the police-power cases cited above, and that it interferes with the rights of the operators which are guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The effect of such legislation is well characterized by the Supreme Court of California, in 112 California, 468, as one of those "experimental laws none the less dangerous because well meant."

The danger of gradual inroads upon the protection afforded by the Fourteenth Amendment to the Constitution of the United States is well pointed out by Mr. Justice Brewer in Railroad Co. *vs.* Ellis, 165 U. S., 150, 153, 154:

> "It is true the amount of the attorney's fee which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by

> Mr. Justice Bradley in Boyd *vs.* United States, 116 U. S., 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*'"

This danger is emphasized by the Court of Appeals, speaking by Justice O'Brien, in People *vs.* Williams, 189 N. Y., 131, 135:

> "The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort, and health of the community, and that a wide range in the exercise of the police power of the State should be conceded, I do not deny; but, when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. **The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked, to protest against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body.**"

It will not be contended that the operator of coal mines belongs to that "dependent class" entitled to be protected by the State. Neither can it be seriously argued that the power vested in the Industrial Commission to fix the maxi-

mum percentages of impurities and the maximum percentages of fine coal has (to use the language of Justice Peckham in Welch *vs.* Swasey, 214 U. S., 105) any "real substantial relation" to the methods of measuring the compensation of the *employee*, and thus safeguarding *his* interests.

It is a matter of common knowledge that fine coal sells for a lesser price than lump or coarse coal. Also, it is well understood that not only do impurities such as rock, slate, dirt, etc., improperly belong in the coal, but they seriously detract from the burning qualities of the coal itself with which they are intimately mixed. It is apparent, therefore, that this part of the act which relates to and confers on the Industrial Commission the power to "fix" the percentage of fine coal and the percentage of impurities was enacted for the *supposed* protection and benefit of the operator. Whether in fact in view of the political complexion of the Industrial Commission, and the large number of votes possessed by miners, and the few votes possessed by operators, it would or would not accomplish its purpose against the abuses of the "mine-run" system, we need not discuss. The constitutionality of the law is not to be determined by its supposed advantages or disadvantages. If a man's constitutional rights are invaded he may complain, even though the legislative purpose in making the invasion was apparently to confer a benefit.

R. R. Co. *vs.* McGuire, 219 U. S., 549.

The law therefore, in depriving the operator of the power and conferring it upon the Industrial Commission to determine for him the "quality" of the product which his employees may load and deliver to him, constitutes an unwarranted and arbitrary interference with the employer's right to determine for himself what quality of coal he will produce, and deprives him of his right to contract therefor. These provisions are wholly unnecessary for the protection of the employee, and bear no substantial relation to the object there sought.

The parts of the law with respect to weighing coal are so connected with the parts that are unconstitutional that they cannot be separated. The invalidity of these provisions, therefore, destroys the whole law.

Cooley on Constitutional Limitations (third ed.), page 178.
Allen *vs.* Louisiana, 103 U. S., 80, 83.
Spraigue *et al. vs.* Thompson, 118 U. S., 90.
International Textbook Co. *vs.* Pigg, 217 U. S., 91, 113.
Treasurer *vs.* Bank, 47 O. S., 503.
State of Ohio *ex rel. vs.* Commissioners, 5 O. S., 497.
Bank *vs.* Hines, 3 O. S., 1, 34.
Gibbons *vs.* Cath. Inst. Cin., 34 O. S., 289.

In Textbook Co. *vs.* Pigg, *supra,* the syllabus reads:

> "Where a statute is unconstitutional in part the whole statute must be deemed invalid, except as to such parts as are so disconnected with the general scope that they can be separately enforced."

In State of Ohio *vs.* Commissioners, *supra,* the last section of the syllabus reads:

> "As a general rule, one part of an act will not be held unconstitutional and another part constitutional unless the respective parts are independent of each other. But in this case the provisions of the first and fifth sections are intimately connected. They were submitted to the electors and voted on as a whole; the fifth section would induce the adoption or rejection of the first. In such a case, they must stand or fall together."

That the legislature would not have passed a "mine-run law" alone and have subjected the operator to the abuses of such a system not only appears from the text of the law itself, but it is further made apparent from the report of

the Mine Commission to the Governor of Ohio. This Commission was appointed by a joint resolution of the Ohio Legislature (103 Ohio Laws, 981). This resolution contained the following preamble:

> "Whereas, there is pending before the General Assembly a bill known as Senate Bill No. 23, relating to the method of weighing coal at the mines throughout the State; and
>
> "Whereas, this subject is of vital importance to the operators and miners, and affects the entire mining industry of the State; and
>
> "Whereas, because of the public nature of the mining industry the interests of the citizens of the State are directly concerned; and
>
> "Whereas, it is necessary for the General Assembly to have full and accurate information on the subject-matter involved, in order to enact laws which will adequately protect the interests of the public, operators, and miners; therefore be it *resolved,*" etc.

(Here follows the authority to the Governor of the State to appoint a Commission of five members, and giving them full power to investigate the subject referred to in the preamble, and "make its full report with whatever recommendations it may see fit to make to the Governor on or before December 1, 1913.")

The Commission was appointed and duly reported to the Governor. This report shows a very full investigation of the subject. The coal business had theretofore been conducted in Ohio almost exclusively on the screen-coal basis, and the question of changing the basis to mine-run basis was the subject of very careful investigation. In this report the Commission stated in great detail the various reasons why the miners want the mine-run instead of screen-coal basis. They also state in considerable detail the reasons why the operators object to the change. They comment upon and reach the conclusion that the mine-run basis has

a tendency to increase the amount of fine coal produced, and also increase the amount of impurities, and that the operator should be protected against the evils of such a system by some proper regulations.

On page 58 of the report they say:

> "Our conclusions are that the adoption of the mine-run system in Ohio would cause a considerable increase in the amount of impurities brought to the surface unless some way were found to protect the operator from the carelessness or indifference of the miner."

On page 59 of the report they say:

> "When we turn to a considertion of the mine-run system of measuring the amount of payment, which is the system employed in many States, and which is the system the miners desire to have adopted by law in Ohio, we encounter the operators' objection to such a system based on the notion that there would be a great increase in the amount of impurities and fine coal sent out of the mine under such a system. We are inclined to give full weight to their objections in so far as they relate to a probable increase in the amount of impurities, the experience of other States, especially those of Illinois and Arkansas, showing these objections to be real. If the mine-run system of payment is to be adopted by law it should apply only to clean coal, *i. e.*, coal cleaned in such a way that the operator is able to market it. * * *
>
> "We also believe that there would be some increase in the amount of fine coal. * * *
>
> "As to whether the adoption of the mine-run system would cause miners to shoot their coal harder, even when the coal was undercut, and thus would result in an increase in the amount of fine coal, we are unable to determine in the light of conflicting testimony which we have on this point. It would appear to be the part of wisdom to provide safeguards for the mine owners which would operate in case their fears in regard to this matter are realized, but the restrictions on the miners need not be so

carefully defined nor enforced by the same penalties as in the case of the impurities. Accompanying this report will be found a draft of several suggested bills, which cover the recommendations made by this Commission."

Attached to said report were five bills referred to in the above paragraph. Bill No. 5 was passed by the legislature and is the bill that we have here under discussion.

THIS ACT IS UNCONSTITUTIONAL UNDER THE CONSTITUTION OF THE STATE OF OHIO.

In the case *In re* Preston, 63 O. S., 428, the Supreme Court of Ohio had before it a mine-run law which contained the following provision:

> "It shall be unlawful for any mine owner, lessee, or operator of coal mines in this State, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Ohio."

The petitioner had been prosecuted for a violation of the act. The court held the act unconstitutional for the reasons stated in the following quotation:

> "It purpose is to terminate the rights heretofore universally recognized in this State, and often exercised, of determining by contracts voluntarily entered into between miners and operators the mode in which the basis of compensation to be made by the latter to the former should be ascertained. Counsel for the State expressly disclaim any authority in the legislature to determine the price to be paid for

> mining coal, and it is true that no such authority is assumed in this act. By the method of payment heretofore in use, in which compensation was determined upon the basis of screened coal, miners have become entitled to receive and operators have become bound to make, compensation having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. * * * It is suggested as the basis of the act, that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud nor to provide for the health or safety of those engaged in mining. Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it establishes a uniform standard of earning capacity. * * *
>
> "This act may be invalid for other reasons, but our decision is placed upon the ground that it is an unwarranted invasion of the rights of miners and operators to make contracts by which the former shall be entitled to receive, and the latter obliged to make compensation according to the value of the service rendered and received."

The police power of the State of Ohio, as defined by the Supreme Court of the State, in the case cited, does not, therefore, extend to the passage of an act such as was there considered.

This case has not been overruled or qualified in any respect, and the present law, considered simply as a "mine-run" law, is, therefore, not within the police power of the State, unless the amendments to the Constitution require a different conclusion.

That the Federal courts are bound by the construction which the highest State court places upon the constitution of its own State is well settled.

Merchants Bank *vs.* Pennsylvania, 167 U. S., 461.

In Haire *vs.* Rice, 204 U. S., 291, 301, Justice Moody said:

> "It is further claimed by the plaintiff in error that the Supreme Court of the State erred in holding that the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the State. Upon this question the decision of that court is conclusive; and plainly we have no power to review it."

See also

Express Company *vs.* Ohio, 165 U. S., 194, 219.
Oakes *vs.* Mase, 165 U. S., 363.
Debitulia *vs.* Lehigh Coal Co., 174 Fed., 886, 888.

It is the settled law, therefore, that, subject to the limitations imposed by the Federal Constitution, the public policy of each State and the extent to which its police powers may be exercised is a matter for the determination of the State courts.

There remains for consideration, therefore, the question whether since the decision in the 63 O. S. the constitution of the State has been amended so as to permit legislation of this character.

Since that decision article 2 of the constitution has been amended by adding, among other sections, section 34, providing that:

> "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

and section 36, providing that:

> "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the State, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the State, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Does the law come within the power conferred upon the legislature by the amendments quoted? As this is not a law with respect to hours of labor or minimum wage, nor relating to the comfort, health, or safety of employees, it must, in order to come within the provisions of section 34, be a law for the "general welfare" of employees. Without this amendment the legislature could, under the police power, pass laws for the "general welfare" of employees, and this amendment adds no new power unless the last clause, in providing that no other provision of the constitution shall impair or limit the power, has that effect. This latter clause, however, does not aid in determining what is the extent of the power conferred on the legislature in permitting it to pass laws for the welfare of employees; it merely prohibits any other section of the constitution from impairing the power thus granted and has no affirmative or positive effect.

The 63 O. S. deals with a statute similar to the Arkansas mine-run law heretofore commented on and reported in 81 Arkansas and in 211 U. S., 539, and held valid. The policy of Ohio was, therefore, prior to the amendment of the Ohio constitution, directly opposite to that of Arkansas. It does not seem to us that the amendments have changed the law

or reversed the policy of the State as settled by the decisions of the Supreme Court of Ohio.

Even if we are wrong in this, however, the present law cannot be sustained.

This amendment, so far as pertinent here, can only be claimed to justify this law as constitutional on the ground that it provides for the "general welfare of all employees." The amendment does not permit the passage of a law which contains restrictions upon the liberty of employers. For example, it cannot be argued that if the legislature should be of the opinion that it would be for the welfare of employees to own their own homes, and to have them fitted out in the most modern and approved manner, that it could under this amendment pass a law providing that the employers must provide their employees with such homes. The amendment did not grant to the legislature any such power. It gives to the legislature the power to pass only such laws as are ordinarily and customarily considered to be for the welfare of employees and not such laws as pretend to come within this power, but are in reality an arbitrary interference with the rights of others.

Suppose the legislature should be of the opinion that the "general welfare" of mine employees would be promoted by State operation of the coal mines, and suppose it should pass a law providing that a State commission should operate the mines and pay a certain royalty to the owners, could it be reasonably argued that such a power is comprehended in the terms of section 34? And yet that would be the result if it be contended that section 34 invests the legislature with absolutely unlimited power to pass any law it sees fit which, in its opinion, will promote the "general welfare" of employees. It would be absurd to maintain that such power was intended to be conferred.

We are not now arguing that this section is limited by any other section of the constitution. We are merely trying to ascertain what extent of power the framers of *this amend-*

ment intended to confer upon the legislature, and we contend that the section does not confer power to pass a law intended for the general welfare of employees which has annexed to it such features as amount to an arbitrary interference with the rights of the employer and which are not reasonably necessary to promote the general welfare of employees. The law under consideration is a law of the latter class. Assuming that it is intended to prevent fraud on employees, it has annexed to it provisions which operate as an arbitrary interference with the right of contract of operators and which bear no substantial relation to the welfare of employees.

In another part of this brief we point out in detail the arbitrariness and unreasonableness of these provisions, and we show that they are not reasonably necessary to secure the end desired. We cannot believe that this amendment confers power to interfere to such an arbitrary and unreasonable extent with the right of contract of operators.

The courts will look at the real effect, object, and operation of the law and will not be deceived by the disguise in which the law is framed. Under the guise of this amendment the legislature is not justified in passing laws causing arbitrary and unreasonable interference with property rights any more than it has under the police power.

The same considerations apply to the amendment in section 36, above quoted, and in a greater degree, because there is no clause added stating that the provisions of section 36 are not limited by any other provisions of the constitution.

Section 36, in permitting the legislature to provide for the regulation of mining and weighing coal, does not grant the power to take from the coal operators their property nor the operation of the same for the benefit of their employees. In spite of this amendment the Bill of Rights still protects the operators of coal mines as well as it protects any other class in the community; it is as broad as section 1 of the 14th amendment.

Adler *vs.* Whitbeck, 44 O. S., 539, 568-569.

The operators' mines and the right to manage their own business cannot be taken from them with any more justification than the property of any other individuals.

Section 19 of article 1 of the constitution of Ohio requires that compensation be made in all cases where private property is taken for public use. If the State desires to regulate the weighing and mining of coal in the interest of the public in such a way as to interfere with the right of the operator to manage his own business, it can do so only by paying the owner therefor. Section 36 plainly contemplates that if action should be taken by the State authorities that it would be taken by constitutional methods and with due regard to the rights of the present owners of such property.

Section 36 deals largely, if not wholly, with conservation. If the present act has for its object the conservation of natural resources, it is plainly unconstitutional. The State may perhaps, in the furtherance of a broad public policy, by proper condemnation proceedings, acquire all the coal property in the State, but it may not, *while such property is privately held,* regulate the operation thereof in the interest of the public or *require the owners to operate* it in the interest of the public without some provision for due compensation. Such action constitutes taking of property without due process of law.

Review of Opinion of Court Below.

The court below in its opinion used the following language:

> "Laws enacted in its appropriate exercise (police powers) have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (Camfield *vs.* U. S., 167 U. S., 518, 524), to promote harmonious relations between capital and labor (McLean *vs.* U. S., 211 U. S., 539, 549, 550), to avert strikes, violence and bloodshed (Peel Splint Coal Co. *vs.* West Virginia, 36 W. Va., 802; Knoxville Iron

Co. *vs.* Harbison, 183 U. S., 13, 21), to provide for the safety and health of miners (Freund, Police Power, sec. 115; Plymouth Coal Co. *vs.* Pennsylvania, 232 U. S., 531), and to regulate mines and mining and to conserve and avoid the waste of fuel, minerals and other natural resources. (Barrett *vs.* Indiana, 229 U. S., 26, 29; State *vs.* Ohio Oil Co., 150 Ind., 21; Ohio Oil Co. *vs.* Indiana, 177 U. S., 190; Hudson Water Co. *vs.* McCarter, 209 U. S., 349; Wilmington Star Mining Co. *vs.* Fulton, 205 U. S., 60.)

In Hudson Water Co. *vs.* McCarter, 209 U. S., 349, 355, Justice Holmes said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would fail. To set such a limit would need compensation and the power of eminent domain.
>
> "It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point."

If we bear in mind the observations of Justice Holmes, we will see how inapplicable to the case we now have under

discussion all the cases are that were cited by the district court in the quotation above.

The case of Canfield *vs.* U. S., 167 U. S., 518, 524, was concerned with the right of Congress to legislate with respect to the public lands. On pages 522 to 524 Justice Brown discussed at some length the question of spite fences between adjoining proprietors. The case of McLean *vs.* U. S., 211 U. S., 539, 549, 550, is cited as an authority on the power of the State to pass laws promoting harmonious relations between capital and labor. The Supreme Court of Arkansas (81 Ark., 304) sustained that statute, and held it to be within the police power of the State on the express ground that it was to prevent fraud by employers upon employees in measuring the product of their labor upon which the employees' wages depended. The court said:

> "* * * The operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miner. The coal 'shall be accepted or rejected,' but 'if accepted' then it 'shall be weighed in accordance with the provisions of the act.'
>
> "The plain purpose of the act, therefore, is not to *prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded.*"

It is true that Justice Day, in delivering the opinion of the Supreme Court in 211 U. S., 539, 550, used the following language:

> "We are unable to say, in the light of the conditions shown in the public inquiry referred to and the necessity for such laws evidenced in the enactment of the legislation of various States that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and *the promotion of the harmonious relation of capital and labor engaged in a great industry in the State.*"

An examination of the opinion shows that the real ground thereof was the same as that of the Supreme Court of Arkansas, to wit, the protection of dependent persons against fraud in the manner of determining the wages they had earned. Peel Splint Coal Company *vs.* West Virginia, 36 W. Va., 802, is cited as an authority for the State to pass laws to avert "strikes, violence, and bloodshed," and there is language in this opinion to that effect.

While we do not quarrel with the judgment rendered, the logic of the case would warrant the State in interfering in each and every negotiation between employer and employee, and fixing and regulating the wages to be paid. If a State may lawfully fix the rate of wages that an employer must pay, it may lawfully fix the rate of wages that the employee must work for (Adair *vs.* U. S., 208 U. S., 161).

Knoxville Iron Co. *vs.* Harbison, 183 U. S., 13, 21, is cited to the same effect. This case deals with a statute requiring employers to redeem in cash, store orders issued to employees in payment of wages, and comes within the principles settled by Holden *vs.* Hardy.

Freund on Police Powers, section 115, and Plymouth Coal Co. *vs.* Pennsylvania, 232 U. S., 531, are cited by the lower court as authority for the proposition that the legislature may provide for the *safety and health of miners.* These principles are not *peculiar to miners.* They inhere in any business which is dangerous. For instance, laws have been held constitutional which require cogs, punches, drills, and other dangerous machinery to be covered by such safety devices as will protect employees. In rooms devoted to manufacturing the accumulated dust from the work performed may be required to be removed; buildings devoted to tenement purposes where people are crowded in their sleeping and living accommodations are lawfully made subject to such regulation as will secure to the occupants sunlight and air; fire escapes upon buildings of certain height and various other things which might be cited pertaining to every kind

of business are proper subjects of police regulation by the State. When we come to mining, it is simply the same principles applied to a like situation. For instance, the miner is removed from the surface of the ground and must be supplied with pure air by artificial circulation; his ingress and egress to the working places in the mines must be by entries driven from the surface, the regulation of the size and width of these entries is therefore proper. Because the legislature may rquire a dangerous piece of machinery to be covered in the interest of the safety of the employee, it may not prescribe the quality of the product that the employer shall hire the employee to produce, or the quantity that he shall produce or the wages he shall be paid. Neither has anybody ever supposed that the recognized power of the State to require proper ventilation of a dusty room devoted to manufacturing or the proper ventilation of tenement buildings, that from that power arises also the power to determine for the manufacturer, in his contract with his employees, that he shall make one kind of goods rather than another, nor, in respect to the tenement house, how much rent shall be charged.

The further cases cited by the lower court may be dismissed with a brief comment. Barrock *vs.* Indiana, 229 U. S., 26, 29, prescribed the width of entries in coal mines. We have already commented on that subject. 150 Ind., 21, and 177 U. S., 190, relate to natural gas. Hudson Water Co. *vs.* McCarter, 209 U. S., 349, relates to the waters of a State which the riparian proprietor proposed to divert to another State. These cases, together with Wilmington Star Mining Co. *vs.* Fulton, 205 U. S., 60, are cited by the lower court as instances of the valid exercise of the police powers of the State to *conserve and avoid the wasting of natural resources.*

The difference between property rights in timber, coal, and other minerals and property rights in such things as gas, oil, and water flowing in streams is pointed out in these

cases and also in Oklahoma *vs.* Gas Co., 221 U. S., 229, and Haskel *vs.* Gas Co., 224 U. S., 217. In 221 U. S., 251-2 it was conceded that property rights in such property as timber, coal, iron, etc., were *absolute.*

The case of Wilmington Star Mining Co. *vs.* Fulton, was a personal injury case. The statute required the appointment of licensed engineers and mine managers. This comes within the observation heretofore made with respect to manufacturing plants. Every State in the Union, so far as I know, has laws requiring the employment of *licensed engineers to operate steam boiler plants.* Wherever there is danger, the employer can be required to employ as managers or superintendents only such persons as have demonstrated by proper examination that they have sufficient experience and skill to do the work safely. To push the observation a point further, the power of the State to require the employment only of licensed engineers would not authorize the State to determine for an employer, if an owner and operator of a blast furnace, that he should make Bessemer pig iron instead of foundry pig iron, or that the iron produced by him should contain one per cent of carbon instead of one-half of one per cent.

The regulation of the business of the employer to the extent necessary to conserve the health and safety of employees is justified, and is within the well-recognized police powers, but to go beyond that and arbitrarily interfere with the business of the employer by dictating what his product shall be or, what amounts to the same thing, committing it to the judgment of a State commission, is something that has never been recognized and is beyond any case in the books.

It may be contended (and perhaps that was the purpose of the court below in citing the above cases) that these were intended simply as *illustrations* of the proper exercise of the police power. If this be the limitation to be placed upon

that part of the opinion, I have no quarrel with it, provided each case is *confined to its own facts.*

That they were thus intended as illustrations is rather emphasized by the last paragraph of the opinion, where it would seem that the court based its judgment upon the ground that the Ohio statute is ruled by "McLean *vs.* Arkansas, and is well within German Alliance Ins. Co. *vs.* Lewis, decided April 20, 1914."

The opinion of the district court does not definitely fix the basis of the decision. It is quite evident the court was of the opinion that the mining business, under section 36, article 2, of the Ohio Constitution as amended, or because held (in the cases cited) *subject to legislative regulation in certain respects, had become affected with a public interest and was subject to regulation in all respects within the principles laid down in German Alliance Ins. Co. vs. Lewis.* Carried to its logical result, this would authorize the legislature to fix the price of coal, in the same way as they fixed the price of insurance in the case cited.

There is language in the opinion indicating ideas favorable to *conservation of natural resources,* and yet it is apparent that those cases which dealt with oil and gas have no application to such property as timber, coal, or other minerals. The latter are subject *to absolute private ownership and may not be taken from the owner for the public benefit without compensation.* The coal business is distinctly a private business. The owner of one hundred acres of coal land has the same title to the coal as to the land. He has the same right to use his private property according to his own ideas as the owner of an hundred acres of agricultural or timber land. Agricultural land wears out, if not properly fertilized, just as effectively as minerals become exhausted by mining operations.

Again, the law in question does not affect the relations of the coal operator toward the public. It deals with the private internal management of the business—the relations

between master and servant. The legislature can no more control the *relations* between employers and employees in the *mining of coal* than like relations in *any other business.*

It is not to be overlooked that in the late case of Insurance Company *vs.* Lewis the justices of the Supreme Court disagreed as to the scope and effect of that decision. Justice Lamar, dissenting, contended that the majority opinion meant the breaking down of all protection of the Fourteenth Amendment of the Constitution of the United States, in that it would destroy all rights of private property. Evidently he and the Chief Justice and Justice Van Devanter had urged that view with great force, but the majority of the court distinctly repudiate any such intention. Thus Justice McKenna said:

> "But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern leave our discussion to take care of itself against such misunderstandings or deductions. The principle we apply is definite and old and is, as we have pointed out illustrating examples, and both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become clothed with a public interest and therefore subject to be controlled by the public for the common good."

In further distinguishing a business like insurance from ordinary business, Justice McKenna said:

> "And so with the regulation of the business of insurance; they have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison with them in relation to the power of government, how can it be said that fixing the prices of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural

> one when it can be denied to individuals and permitted to corporations? How can it be said to have the profit of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rights denied and a limitation on its risks imposed? Are not such regulations restrictions upon the exercise of personal right—asserted to be fundamental—of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose?"

It is apparent, therefore, that the coal business, which consists simply in separating one species of property—mineral coal—from the balance of the property and selling it to the public, is distinctly a private business in which any owner of such property may lawfully engage. His business, like any other business involving danger, is subject to regulation under the police power in respect to the safety and health of the persons engaged in the business, and laws may be passed that have some substantial and necessary relation to the health and safety of employees in mines. Laws also may be passed which will protect employees against fraud in the payment of their wages. The exercise of the police power under any of these heads is not peculiar to mining business, but reaches out into every business whose operation involves danger to the health and safety of employees.

An examination of the present law, however, shows that it has no relation whatever to the health or the safety of the employees. It is concerned solely with the payment of their wages, and had it stopped with appropriate provisions upon that subject it would have been within the principles of McLean *vs.* Arkansas, but there is no relation between the protection of the miners in the payment of their wages and the fixing of the per cent of impurities and per cent of fine coal. The coal operator must be left free, like any other person engaging in business, to determine what he can produce and market. There is no warrant for interfering with and

abridging the right of contract in the respects attempted by the Ohio law.

The court below, in respect to the contention by plaintiff that the penalties prescribed by section 6 of the act were so excessive as to deny to the operator the equal protection of the law, and to the contention that the act was penal in its nature, said:

> "If the penalties are a separate part of the act, which we need not now determine, the objection to it on account of them is premature. Flint *vs.* Stone Tracey Company, 220 U. S., 177. If they are not thus separate, they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer wishing to test the law will risk the possibility of repeated violations of the Commission's orders."

Section 6 denounces the penalty from the act of the employer and it is in no manner dependent upon the "Commission's *orders.*" Under this law each and every car of coal which is passed over a screen or other device whereby the contents of the car is reduced before calculating the amount to be paid the miner is a misdemeanor rendering the operator liable to a minimum fine of $300 and maximum of $600, and the bill in this case shows that at the minimum rate the fines that would be assessed against the plaintiff in this case would be over $800,000 per day.

The proposition that the operator might disobey the law once, that is, by passing one car over a screen contrary to the law, and then, being a "prudent" person, will obey the law until its constitutionality can be determined, was conclusively answered by the Supreme Court of the United States in *Ex Parte Young,* 209 U. S., 123, 145-147, 163. Quoting therefrom, we find the principle announced to be as follows:

> " 'It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and

if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' (Quotation from Mr. Justice Brewer in Cotting *vs.* Kansas City Stock Yards Company.) The question was not decided in that case, as it went off on another ground. * * *

"It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

(Page 163:)

"It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

The law is distinctly penal in character. If the penalties of section 6 are stricken out there is no way to enforce obe-

dience. The State would be powerless. The case differs from the Wilcox and other cases involving rates of public service corporations which are capable of enforcement by means other than the penalties. The miners would have no standing in court as individuals to effect any practical result. It is evident, therefore, that the law would not have been passed without the penalty clause.

The point made, that in the Commission's report it was stated that payment of wages on the mine-run basis would have a tendency to make the miner send out all the fine coal, might sustain the mine-run payment feature of the law. But the Ohio law deals with matters that bear no relation to the wages of employees, or to their safety, to wit, the determination by the Industrial Commission for the operator of the amount of impurities that he shall accept and pay for, thus violating the inherent right of the operator to contract for the production and produce coal that will fill his market requirements.

In the report of the Ohio Coal Commission, referred to in the opinion of the lower court (pages 54 and 55), it was said:

> "The miners say that they do not demand pay for dirt, at least for that amount of dirt which could have been eliminated by careful loading and that if the operators desire to dump the mine car and take out the dirt before the coal is weighed, they are willing that this be done.
>
> "The original Green bill, introduced at the last session of the legislature, provided for weighing the coal in the mine car. This would have made it impossible to remove any considerable amount of the dirt before determining the pay of the miners. The unfairness to the operators and the possible disadvantageous effect upon the consumers of coal were so apparent that the bill in the course of its discussion in the two houses was amended with the consent of the author so as not to require payment in the mine car but to allow the impurities to be removed before the coal was weighed.

> "The question, however, arises, how far is it practicable to secure clean coal by such a method? How is it possible to clean the coal on the tipple before it is weighed and before the miner is credited with the weight of his car if he is to be paid for his work on the mine-run basis? If it were possible to do this and credit each miner with the total product of clean coal, this would be an equitable solution of the difficulty, at least so far as the question of clean coal enters into the controversy. Neither the miners nor the operators, however, have been able to show us how this is to be done."

On page 51 of said report the Commission said:

> "All parties agree that the place to remove these impurities is in the mine at the working places."

If this report is to be relied upon as expressive of common experience, it is quite apparent that the only place to properly clean coal is in the mine where it is produced. Common sense also would tell us the same thing. Impurities in coal are slate and dirt, which usually exist in bands. The majority of them must be removed at the time the coal is being mined. It will be too late to remove the fine dirt after once mixed with the coal. To deprive the operator of the right of rejecting coal which does not come up to his market requirements and delegating the power to a State commission to determine for him what he shall have, is an unlawful interference with his right to manage his own business.

The State of Ohio has legislation requiring the removal of dust from mines, punishing non-observance by suitable penalties.

Judge Shauck, speaking for the Supreme Court of Ohio (*In re* Preston, 63 O. S., 428, 439), referring to the suggestion that frauds might be perpetrated in screening and weighing coal, said:

> "That if such danger exists it may well justify appropriate legislation for the prevention of such fraud."

In Oklahoma *vs.* Kansas Natural Gas Company, 221 U. S., 229, 251, Justice McKenna said:

> "If the right of conservation be as complete as contended for it could be secured by simple prohibitions or penalties."

It is a wholly unwarranted assumption, in view of the state of the law in Ohio, that this particular law, the *title to which is plain* and the language of which is plain, was designed to supplement the penal laws and promote the safety of mining (Dart *vs.* Bagley, 110 Mo., 42, 51; Lessee Burgett *vs.* Burgett, 1 O., 469, 481; State *vs.* Pugh, 43 O. S., 113). In view of the well-recognized increase in the dangers of mining, when coal is produced on the mine-run basis, the claim is not only far-fetched but is contrary to all *human experience.* Even, however, if this were true, it relates only to the "mine-run feature." The legislature may not, in enacting a law for weighing coal before screening, incorporate with it provisions that bear no "substantial and necessary relation to the end in view." The provision of the law delegating to the Industrial Commission the right to fix the impurities in the coal has no relation whatever to the mine-run feature.

The observation is made that the law does not prohibit employment of miners by the day or by the week. This same suggestion was made in the McLean case. This overlooks the fact that every business might theoretically be conducted on a basis which, practically, has been demonstrated to be impossible. For instance, hand labor has in many occupations become obsolete because of inventions of machines. The affidavit in this case shows that the employees in Ohio are unionized, that their bargains are collective bargains, and that all men who mine or load coal are paid by the weight and not by the day. To attempt to pay men in any other way, in view of the nature of the business and the impracti-

cability of its supervision, would quickly deprive any operator into bankruptcy.

While, therefore, theoretically it may be possible to contract by the day, or by the week, practically it is not.

Very respectfully submitted,

A. C. DUSTIN.